United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7278

Volume A-1
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7278

B

MARGARET MARY MCDONNELL MURPHY,
Plaintiff-Appellant,

against

MCDONNELL & CO., INCORPORATED and THE NEW YORK STOCK EXCHANGE by ROBERT W. HAACK, President,
Defendants.

P/S

JAMES F. MCDONNELL, JR., individually, as Trustee under the Will of James F. McDonnell and as Executor of the Estate of Anna M. McDonnell, and CHARLES E. MCDONNELL, as Executor of the Estate of Anna M. McDonnell,
Plaintiff-Appellants,

against

THE NEW YORK STOCK EXCHANGE by ROBERT W. HAACK, THE NEW YORK STOCK EXCHANGE, INC., THE AMERICAN STOCK EXCHANGE by H. VERNON LEE, JR., Secretary, and MCDONNELL & CO., INC.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX (Vol. A-1)

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

DAVIS & COX
One State Street Plaza
New York, N. Y. 10004
Attorneys for Plaintiff-Appellants

MILBANK, TWEED, HADLEY & MCCLOY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

LORD DAY & LORD
25 Broadway
New York, N. Y. 10005
Attorneys for Defendant
American Stock Exchange

PROSKAUER, ROSE, GOETZ & MENDELSOHN
300 Park Avenue
New York, N. Y. 10022
Attorneys for Defendant
McDonnell & Co., Inc.

October 8, 1976.

PAGINATION AS IN ORIGINAL COPY

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LIST OF RELEVANT DOCKET ENTRIES

DOCKET ENTRIES IN 71 CIV. 461:

Date	Proceedings
February 3, 1971	Filed Complaint. Issued Summons
March 2, 1971	Filed stipulation and order extending defendant New York Stock Exchange's time to answer complaint to March 21, 1971. So ordered. Frankel, J.
March 5, 1971	Filed stipulation and order that time of defendant McDonnell & Co. to answer the complaint is extended to March 22, 1971. Frankel J.
March 9, 1971	Filed summons with marshal's return. Served McDonnell & Co. Inc. by Miss L. Palmier on February 11, 1971. - Served the New York Stock Exchange by Robert W. Haack on February 9, 1971.
March 19, 1971	Filed Answer of New York Stock Exchange, Inc. to complaint.
March 23, 1971	Filed Answer of McDonnell & Co., Inc. to complaint.
March 23, 1971	Filed Notice to take deposition upon oral examination of plaintiff.
April 22, 1971	Filed plaintiff's request for production of documents.
May 26, 1971	Filed Response of Defendant Exchange to Request for Production.
June 15, 1971	Filed Notice of Motion re: Consolidate-returnable June 29, 1971. (Filed in 71 Civ. 1281)
June 15, 1971	Filed memorandum in support of motion to consolidate. (Filed in 71 Civ. 1281)
June 28, 1971	Filed plaintiffs' memorandum of law in opposition to motion to consolidate.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
June 28, 1971	Filed affidavit in opposition to motion to consolidate, with affidavit of service (Filed in 71 Civ. 1281).
June 28, 1971	Filed memorandum of law in opposition to motion to consolidate. (Filed in 71 Civ. 1281).
August 4, 1971	Filed memo endorsed on motion filed on June 15, 1971 -- Motion withdrawn in accordance with stipulation submitted and signed this day. So Ordered; Tenney, J.
August 4, 1971	Filed stipulation and order that motion of defendant New York Stock Exchange, Inc. for an order consolidating for all purposes, returnable August 3, 1971, is hereby withdrawn without prejudice, etc. So Ordered; Tenney, J.
December 10, 1971	Filed plaintiffs' notice of motion, Re: Produce and Inspect-returnable December 16, 1971.
December 15, 1971	Filed stipulation that plaintiffs' motion is adjourned from December 16, 1971 to December 23, 1971.
December 22, 1971	Filed stipulation adjourning motion now returnable December 23, 1971 to January 6, 1972.
January 6, 1972	Filed stipulation withdrawing motion now returnable January 6, 1972. So Ordered, Pierce, J.
January 6, 1972	Filed Memo endorsed on motion paper dated December 10, 1972 Re: Motion Withdrawn by Stipulation. So Ordered. Pierce, J.
August 3, 1972	Filed notice of change of address of Davis & Cox to One State Street Plaza, New York, N. Y. 10004.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
August 29, 1972	Filed order and stipulation substituting Proskauer, Rose, Goetz & Mendelsohn in place and stead of Weil Gotshal & Manges, 767 Fifth Avenue, New York, N. Y. So Ordered. Gagliardi, J.
March 6, 1973	Filed notice of deposition.
March 28, 1973	Filed notice of deposition upon plaintiff by defendant New York Stock Exchange Inc.
March 28, 1973	Filed Defendant Exchange's request of plaintiffs for production of documents. (First Set).
March 29, 1973	Pre-trial conference held. Ryan, J.
April 16, 1973	Filed Order. Ordered that 71 Civil 1940 be consolidated into 71 Civil 461. Ryan, J. (M/N)
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Richard A. Greves, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Kaspareck, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. F. Stock, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. W. E. Jones, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Paul Fitzgerald, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Spies, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. McElroy, by plaintiff.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Lloyd W. McChesney, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. David Fuchs, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Arning, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Herb E. Schuette, by plaintiff.
May 4, 1973	Filed Defendant New York Stock Exchange's motion to compel production of documents 5/4/73. (Also in 71 Civ. 1940).
May 4, 1973	Filed Memo endorsed on motion filed this date. Motion granted as indicated. (Also in 71 Civ. 1940).
May 4, 1973	Filed affidavit of David S. Dubin in opposition to request of defendants New York Stock Exchange Inc., etc. (Also in 71 Civ. 1940).
May 4, 1973	Filed Notice of Deposition upon Mr. Schuette by plaintiffs. (Also in 71 Civ. 1940).
May 4, 1973	Filed Notice of Deposition upon Mr. W. E. Johns by plaintiffs. (Also in 71 Civ. 1940).
May 4, 1973	Filed Notice of Deposition upon Mr. Arning by plaintiffs. (Also in 71 Civ. 1940).
May 4, 1973	Filed Notice of Deposition upon Mr. McChesney by plaintiffs. (Also in 71 Civ. 1940).
May 4, 1973	Filed Notice of Deposition upon Mr. Fuchs by plaintiffs. (Also in 71 Civ. 1940).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
May 24, 1973	Filed Defendant American Stock Exchange's request for production of documents.
May 29, 1973	Filed plaintiffs' notice of deposition upon Mr. Schuette.
May 29, 1973	Filed notice of deposition upon Mr. Arning by plaintiffs.
May 31, 1973	Filed notice of deposition upon Mr. Fuchs, by plaintiffs.
June 1, 1973	Filed notice of deposition upon W. E. Jones, by plaintiffs.
June 12, 1973	Filed Defendant New York Stock Exchange Inc.'s notice of deposition upon Morgan N. McDonnell.
June 12, 1973	Filed Defendant New York Stock Exchange Inc.'s notice of deposition upon T. Murray McDonnell.
June 21, 1973	Filed notice of deposition upon Richard Olney III by defendant New York Stock Exchange, Inc.
August 7, 1973	Filed Defendant New York Stock Exchange Inc.'s notice of motion re: Compel Discovery, returnable sine die.
August 7, 1973	Filed memorandum in support of motion to compel discovery pursuant to Rule 37.
August 7, 1973	Filed Defendant New York Stock Exchange Inc.'s Interrogatories to plaintiff, James F. McDonnell, Jr. (First Set).
August 7, 1973	Filed Defendant New York Stock Exchange Inc.'s Interrogatories to plaintiff Anna M. McDonnell (First Set).
August 7, 1973	Filed Defendant New York Stock Exchange, Inc.'s Interrogatories to plaintiff Margaret Mary McDonnell Murphy (First Set).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
September 5, 1973	Filed notice of deposition of S.E.C. by Mr. Joseph Barton on October 11, 1973, by plaintiffs.
September 5, 1973	Filed notice of deposition of Mr. Paul McDonald on October 4, 1973, by plaintiffs.
September 5, 1973	Filed plaintiffs' notice of deposition by Mr. Tom Ford on October 3, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition by Mr. David Rome on September 25, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition of American Stock Exchange by H. Vernon Lee, Jr. on September 18, 1973.
September 5, 1973	Filed response of plaintiff Margaret Mary McDonnell Murphy to First Set of Rule 33 Interrogatories propounded by Defendant New York Stock Exchange.
September 5, 1973	Filed response of plaintiff Anna M. McDonnell to first set or rule 33 interrogatories propounded by Defendant New York Stock Exchange.
September 5, 1973	Filed response of plaintiff James F. McDonnell, Jr. to first set of rule 33 interrogatories propounded by defendant New York Stock Exchange.
October 16, 1973	Filed plaintiffs' affidavit in opposition to motion to compel discovery.
October 16, 1973	Filed plaintiffs' memorandum in opposition to motion to compel discovery.
November 16, 1973	Filed Defendant New York Stock Exchange Inc.'s notice of deposition of Robert Murphy.
November 19, 1973	Pre-trial conference held.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
November 26, 1973	Filed Order that all discovery by all parties be completed by February 1, 1974. No further extensions will be granted. Ryan, J. (mailed notice).
December 27, 1973	Filed plaintiffs' notice of deposition of Lybrand Ross Bros. & Montgomery on January 9, 1974.
December 27, 1973	Filed plaintiffs' notice of deposition of Lloyd McChesney on January 11, 1974.
December 28, 1973	Filed plaintiffs' notice of deposition of Lloyd McChesney on January 11, 1974 (amended).
January 22, 1974	Mailed notice of reassignment.
January 22, 1974	Pre-trial conference held. Schreiber, J.
January 31, 1974	Filed Defendant New York Stock Exchange Inc.'s request for supplemental response of plaintiffs to interrogatories 1.
January 31, 1974	Filed Defendant New York Stock Exchange Inc.'s request for supplemental response of plaintiffs to interrogatories 1.
January 31, 1974	Filed Defendant New York Stock Exchange Inc.'s request for supplemental response of plaintiffs to interrogatories 1.
February 1, 1974	Filed memorandum decision and order. Plaintiffs' application is denied on the reasoning as indicated. Owen, J. (mailed notice).
February 15, 1974	Filed plaintiffs' notice of motion re: Production of Subpoenaed Documents, returnable sine die.
February 15, 1974	Filed memorandum of law pertaining to the production of subpoenaed documents from a Government Agency.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
February 15, 1974	Filed affidavit of David S. Dubin in support of plaintiffs' motion.
February 15, 1974	Filed affidavit of service by mail by Bonnie Roller on 2/14/74.
February 15, 1974	Filed plaintiffs' request for discovery and production of documents.
February 22, 1974	Filed affidavit in opposition to motion for an order compelling SEC to comply with subpoena duces tecum, by Russell E. Brooks.
February 22, 1974	Filed response and objections to plaintiffs' request for production of documents, by New York Stock Exchange Inc.
February 27, 1974	Filed deposition of Morgan F. McDonnell on January 4, 1974. (Mailed notice).
February 28, 1974	Pre-trial conference before Owen, J.
February 28, 1974	Filed affidavit of service by mail by Danny M. Pepitone on February 28, 1974.
February 28, 1974	Filed supplemental response of plaintiff Margaret Mary McDonnell Murphy to First Set of Rule 33 Interrogatories, propounded by Defendant New York Stock Exchange.
February 28, 1974	Filed supplemental response of plaintiff Anna M. McDonnell to First Set of Rule 33 Interrogatories, propounded by Defendant New York Stock Exchange.
February 28, 1974	Filed supplemental response of plaintiff James F. McDonnell to First Set of Rule 33 Interrogatories, propounded by Defendant New York Stock Exchange.
March 14, 1974	Filed memorandum of law in support of plaintiffs' motion.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
March 14, 1974	Filed plaintiffs' notice of motion re: Produce documents, returnable March 29, 1974.
March 22, 1974	Filed motion of the Securities and Exchange Commission for a protective order, returnable sine die.
March 22, 1974	Filed memorandum of the S.E.C. in support of the commission's motion for a protective order and in opposition to plaintiffs' motion for order directing production of certain documents.
March 22, 1974	Filed affidavit by George A. Fitzsimmons in support of S.E.C.'s motion.
April 2, 1974	Filed affidavit in opposition to plaintiffs' motion to compel production of documents.
April 2, 1974	Filed plaintiffs' memorandum of law.
April 4, 1974	Pre-trial conference before Schreiber, J.
April 15, 1974	Filed affidavit of David S. Dubin submitted in accordance with local court rule 9(f).
April 16, 1974	Filed supplemental affidavit pursuant to local rule 9(f) submitted on behalf of Defendant New York Stock Exchange Inc.
April 22, 1974	Filed reply affidavit of David S. Dubin to supplemental affidavit of Russell E. Brooks.
April 22, 1974	Filed second supplemental affidavit on behalf of Defendant Exchange.
July 12, 1974	Filed memo endorsed on motion dated March 14, 1974. These are two motions involving discovery, etc. On the motion for discovery of New York Stock, the Exchange is directed to produce the materials demanded as indicated; and as to

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
July 12, 1974 (continued)	motion of SEC for a protective order, the commission appears to have merit to its argument that the 42 enumerated documents are privileged. However, I cannot make that determination on the affidavit of George S. Fitzsimmons, and therefore direct that those documents be delivered to my chambers on or after August 12, 1974, etc. Owen, J. (m/n).
July 12, 1974	Filed memo endorsed on motion dated February 15, 1974. These are two motions involving discovery, etc. On the motion for discovery of New York Stock Exchange, the Exchange is directed to produce the materials demanded as indicated; and as to motion of SEC for a protective order, the commission appears to have merit to its argument that the 42 enumerated documents are privileged. However I cannot make the determination on the affidavit of George S. Fitzsimmons and therefore direct that those documents be delivered to my chambers on or after August 12, 1974, etc. Owen, J. (mailed notice).
August 12, 1974	Filed affidavit by George A. Fitzsimmons, attorney and secretary of the U.S. SEC directing production of documents in its possession.
October 11, 1974	Filed Opinion #41,296--Plaintiffs' motion to compel denied. The Commission's motion for a protective order is granted. Owen, J. Mailed notices.
November 22, 1974	Pre-trial conference held by Schreiber, J.
December 3, 1974	Filed plaintiffs' application to amend complaint-returnable before Magistrate Schreiber on December 16, 1974.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
December 3, 1974	Filed plaintiffs' memorandum of law in support of application to amend.
December 3, 1974	Filed plaintiffs' affidavit in support of motion to amend.
December 3, 1974	Filed affidavit of personal service of application, affidavit, and memorandum in support of amendment to complaint.
December 16, 1974	Filed defendant's (New York Stock Exchange) affidavit in opposition to motion for leave to amend complaint.
December 16, 1974	Filed defendant's (New York Stock Exchange) memorandum in opposition to motion to amend complaint.
December 20, 1974	Filed plaintiffs' supplemental affidavit in support of application to amend.
December 20, 1974	Filed plaintiffs' reply memorandum in support of application to amend.
December 23, 1974	Pre-trial conference held by Schreiber, J.
January 15, 1975	Filed defendants' (Exchange) affidavit in support of modifying Magistrate's recommended order.
January 21, 1975	Filed defendant's (Exchange) reply affidavit to letter of David S. Dubin.
February 6, 1975	Filed order-Motion to amend herein to add a claim for breach of third party beneficiary contract is granted. Motion to amend to seek rescission of certain agreements is granted. Motion to add defendant in 71 Civ. 461 is denied. Motion to amend to allege a claim of conspiracy to defraud is denied. Motion is in all additional respects denied. Plaintiff may file within 5 days after entry of this order an amended complaint--Owen, J. Mailed notices.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
February 7, 1975	Filed supplemental affidavit of D. S. Dubin in support of application to amend.
February 7, 1975	Filed affidavit of J. J. Loflin in opposition to motion to amend.
February 11, 1975	Filed amended complaint with jury demand.
February 11, 1975	Filed additional defendants (Kayne) on counterclaims answers to defendants interrogatories.
February 11, 1975	Filed additional defendants (Sloane) on counterclaims answers to defendants interrogatories.
February 24, 1975	Filed answer of defendant (New York Stock Exchange) to amended complaint.
February 28, 1975	Filed plaintiffs' affidavit and notice of motion for consolidation for all purposes - returnable March 7, 1975.
February 28, 1975	Filed plaintiffs' memorandum in support of motion for consolidation.
March 3, 1975	Filed defendant's (New York Stock Exchange) affidavit and notice of motion for summary judgment - returnable March 14, 1975.
March 3, 1975	Filed defendant's (New York Stock Exchange) memorandum of law in support of motion for summary judgment.
March 4, 1975	Filed answer of defendant McDonnell & Co. to amended complaint.
March 14, 1975	Filed defendant's (American Stock Exchange Inc.) affidavit and notice of motion for an order granting summary judgment - returnable sine die.
March 14, 1975	Filed defendant's (American Stock Exchange Inc.) memorandum of law.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
March 19, 1975	Filed order to show cause for shortening the defendants' time to object to the annexed requests for admission regarding documents, etc. - returnable March 21, 1975. Owen, J.
March 21, 1975	Filed New York Stock Exchange's affidavit in response to plaintiffs' order to show cause by Russell E. Brooks.
March 31, 1975	Filed response of New York Stock Exchange to request to admit.
April 2, 1975	Filed Receiver for defendant McDonnell & Co.'s response to request for admissions.
April 7, 1975	Filed defendant's (New York Stock Exchange) request for admissions.
April 14, 1975	Filed defendant's (New York Stock Exchange) second request for admissions.
April 14, 1975	Filed plaintiffs' response to defendant's (New York Stock Exchange) request to admit.
April 21, 1975	Filed plaintiffs' response to defendant's (New York Stock Exchange) second request to admit.
April 28, 1975	Filed deposition of Anna M. McDonnell taken May 8, 1973.
April 28, 1975	Filed deposition of Margaret Mary McDonnell Murphy taken May 30, 1973.
April 28, 1975	Filed deposition of Margaret Mary McDonnell Murphy taken November 30, 1973.
April 28, 1975	Filed deposition of Robert Murphy taken November 30, 1973.
April 28, 1975	Filed deposition of James F. Mc Donnell, Jr. taken on May 9, 1973.

LIST OF RELEVANT DOCKET ENTRIES

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 28, 1975	Filed deposition of James F. McDonnell, Jr. taken on May 10, 1973.
April 28, 1975	Filed deposition of James F. McDonnell, Jr. taken on January 4, 1974.
April 28, 1975	Filed deposition of Richard Olney III, taken on July 10, 1973.
April 28, 1975	Before Owen, J. -- Jury trial begun.
	April 29, 1975 - Trial continued
	April 30, 1975 - " "
	May 1, 1975 - " "
	May 2, 1975 - " "
	May 5, 1975 - " "
	May 6, 1975 - " "
	May 7, 1975 - " "
	May 8, 1975 - " "
	May 9, 1975 - " "
	May 12, 1975 - " "
	May 13, 1975 - " "
	May 14, 1975 - " "
	May 15, 1975 - " "
	May 19, 1975 - " "
	May 20, 1975 - " "
	May 21, 1975 - " "
	May 22, 1975 - " " and concluded. Total trial days 18 -- Jury Verdict see minute sheets.
May 1, 1975	Filed deposition of T. Murray McDonnell taken on June 28, 1973.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
May 1, 1975	Filed continued deposition of T. Murray McDonnell taken on July 12, 1973.
May 1, 1975	Filed continued deposition of T. Murray McDonnell taken on July 9, 1973.
May 1, 1975	Filed continued deposition of T. Murray McDonnell taken on July 30, 1973.
May 28, 1975	Filed transcript of record of proceedings, dated March 10, 1975.
June 2, 1975	Filed defendant's (Exchange) memorandum in opposition to plaintiffs' offer of expert testimony.
June 25, 1975	Filed memorandum of defendant American Stock Exchange Inc. in support of motion for summary judgment.
June 25, 1975	Filed plaintiffs' request to charge.
June 25, 1975	Filed defendant's (New York Stock Exchange) supplemental request to charge.
June 25, 1975	Filed defendant's (New York Stock Exchange) second supplemental request to charge.
June 25, 1975	Filed defendant's (New York Stock Exchange) third supplemental request to charge.
June 25, 1975	Filed American Stock Exchange Inc.'s request to charge.
June 26, 1975	Filed plaintiffs' trial memorandum.
June 26, 1976	Filed plaintiffs' supplementary requests to charge.
June 26, 1976	Filed trial memorandum of defendant American Stock Exchange, Inc.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
July 9, 1975	Filed transcript of record of proceedings dated April 28, 1975; April 29, 1975; April 30, 1975; and May 12, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 12, 1975; May 13, 1975, May 14, 1975; and May 15, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 19, 1975; May 20, 1975; May 21, 1975; and May 22, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 6, 1975; May 7, 1975; May 8, 1975; and May 9, 1975.
July 18, 1975	Filed plaintiffs' affidavit and notice of motion for an order setting aside the verdict in favor of the New York Stock Exchange, etc., as indicated - returnable before Owen, J. on July 25, 1975.
July 18, 1975	Filed plaintiffs' memo of law in support of said motions pursuant to Rules 39 (b) etc., as indicated.
July 24, 1975	Filed stipulation and order that plaintiffs' motion seeking to set aside the verdict in favor of the New York Stock Exchange, etc. is extended to September 19, 1975 and the time for defendants to submit answering papers is extended to September 12, 1975, Owen, J.
September 12, 1975	Filed affidavit and notice of motion by defendant McDonnell & Co. Inc. for an order setting aside the verdict of the jury, returned herein on May 21, 1975, etc., as indicated-returnable on September 26, 1975. Also entered in 71 Civ. 1940.
September 12, 1975	Filed defendant McDonnell & Co. Inc.'s memo of law in opposition to plaintiffs' motion, etc. as indicated.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
September 12, 1975	Filed defendant New York Stock Exchange's memo in opposition to plaintiffs' motion for judgments notwithstanding the verdict or a new trial. Also filed in 71 Civ. 1940.
September 17, 1975	Filed memo of law of defendant American Stock Exchange Inc. in opposition to plaintiffs' motion for judgment notwithstanding the verdict of a new trial.
September 22, 1975	Filed stipulation and order that the return date of the motions indicated is extended to October 3, 1975, etc., as indicated. Owen, J.
September 29, 1975	Filed plaintiffs' preliminary request to charge.
October 1, 1975	Filed memo of defendant New York Stock Exchange, Inc. in support of motion for summary judgment.
October 1, 1975	Filed trial memorandum of defendant New York Stock Exchange, Inc.
October 1, 1975	Filed reply memorandum of law in support of plaintiffs' motions under Rules 39 (b), etc., and in opposition to defendant McDonnell & Co. Inc.'s motion under Rule 59 (a). Filed in 71 Civ. 461.
October 15, 1975	Filed notice of settlement of counterorder dated December 27, 1974.
October 15, 1975	Filed supplemental memorandum of defendant New York Stock Exchange in opposition to plaintiffs' motion for a judgment, etc., as indicated.
October 15, 1975	Filed reply affidavit of defendant McDonnell & Co. Inc. in reply to plaintiffs' contention that McDonnell & Co.'s motion is untimely, etc., as indicated.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
December 8, 1975	Filed opinion #43498 - defendant's motion to set aside jury verdict or to reduce the damages is granted to the extent that the judgment awarded to plaintiff Margaret Murphy be reduced from $300,000 to $282,623 and the damages awarded to plaintiffs Anna McDonnell and James McDonnell, Jr. be reduced from $350,000 to $318,622. Plaintiffs are directed to submit a judgment on notice. Owen, J. (mailed notice) (also in 71 Civ. 1940).
December 23, 1975	Filed memo endorsed on plaintiffs' motion to set aside the verdict, filed July 18, 1975. Motion denied. Owen, J. (mailed notice).
January 26, 1976	Filed plaintiffs' memorandum of law in support of proposed judgment. (Also in 71 Civ. 1940).
April 23, 1976	Filed memo and order - I conclude that interest should be allowed for the period of the fraudulent taking of plaintiffs' property up to and including the date of the order appointing a receiver for McDonnell & Company. Whether an award of interest is appropriate for any subsequent period, I leave to the discretion of the Bankruptcy Court. Owen, J. M/N.
April 29, 1976	Filed notice that plaintiff will take deposition of the persons named at times and places indicated.
April 28, 1976	Filed deposition of Fred J. Stock, Jr., taken on June 12, 1973. (Mailed notice).
April 28, 1976	Filed deposition of New York Stock Exchange by Robert A. Spies taken on April 17, 1973. (Mailed notice).
April 28, 1976	Filed deposition of David W. Rome taken on September 25, 1973. (Mailed notice).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 28, 1976	Filed deposition of W. Ellsworth Jones taken on May 3, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Herbert E. Schuette taken on May 21, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Thomas P. Ford taken on October 3, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Paul K. McDonald taken on October 9, 1973. (Mailed notice).
April 28, 1976	Filed deposition of New York Stock Exchange by Robert M. Bishop taken on April 24, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Lee D. Arning taken on May 3, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of Lee Arning taken on June 8, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of Lee D. Arning taken on June 19, 1973. (Mailed notice).
April 28, 1976	Filed deposition of New York Stock Exchange by Richard A. Greves taken on June 5, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Lloyd McChesney taken on February 11, 1974. (Mailed notice).
April 28, 1976	Filed continued deposition of Lloyd W. McChesney taken on January 21, 1974. (Mailed notice).
April 28, 1976	Filed continued deposition of Lloyd W. McChesney taken on January 22, 1974. (Mailed notice).
April 28, 1976	Filed deposition of Alvin J. Mentzel taken on January 29, 1974. (Mailed notice).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 28, 1976	Filed deposition of Paul H. Fitzgerald taken on June 15, 1973. (Mailed notice).
April 28, 1976	Filed deposition of David Fuchs taken on June 14, 1973. (Mailed notice).
April 28, 1976	Filed deposition of William G. Carr taken on July 5, 1973. (Mailed notice).
April 28, 1976	Filed deposition of H. Vernon Lee, Jr., taken on September 18, 1973. (Mailed notice).
April 28, 1976	Filed deposition of Andrew R. McElroy taken on June 6, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of Alvin J. Mentzel taken on February 12, 1974. (Mailed notice).
April 28, 1976	Filed continued deposition of Alvin J. Mentzel taken on February 13, 1974. (Mailed notice).
April 28, 1976	Filed continued deposition of Alvin J. Mentzel taken on February 21, 1974. (Mailed notice).
April 28, 1976	Filed deposition of George H. Newman taken on May 3, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of George H. Newman taken on May 10, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of New York Stock Exchange by Robert M. Bishop on April 25, 1973. (Mailed notice).
April 28, 1976	Filed continued deposition of New York Stock Exchange by Robert M. Bishop taken on April 30, 1973. (Mailed notice).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 28, 1976	Filed continued deposition of New York Stock Exchange by Robert M. Bishop taken on May 1, 1973. (Mailed notice).
April 30, 1976	Filed defendant's (McDonnell & Co.) memorandum of law in opposition to plaintiffs' requested proposed judgment.
May 12, 1976	Filed judgment #76,442 - That plaintiff Margaret Mary McDonnell Murphy is awarded judgment against McDonnell & Co., Inc. in the sum of $282,623 plus interest in the sum of $45,911.49, totalling $328,534.49. That plaintiff James F. McDonnell, Jr., as Trustee under the Will of James F. McDonnell, is awarded judgment against McDonnell & Co., Inc. in the sum of $318,622 plus interest in the sum of $53,974.18, totalling $372,596.18. Ordered that defendant McDonnell & Co., Inc. is awarded judgment dismissing all the remaining claims against it in 71 Civ. 461 and 71 Civ. 1940. That defendant Amex (American Stock Exchange) is awarded judgment dismissing all the claims against it in 71 Civ. 1940, and that the defendant N.Y.S.E. (New York Stock Exchange) is awarded judgment dismissing all the claims against it in 71 Civ. 461 and 71 Civ. 1940. Owen, J. Judgment entered May 13, 1976. Clerk. Entered May 13, 1976. (Also in 71 Civ. 1940). (Mailed notice).
June 10, 1976	Filed plaintiffs' notice of appeal from the judgment entered on May 13, 1976. (Mailed notice).
June 10, 1976	Filed plaintiffs' undertaking for costs on appeal in the sum of $250.00 - National Surety Corporation.
June 22, 1976	Stipulation and order extending time to transmit record on appeal.

LIST OF RELEVANT DOCKET ENTRIES

DOCKET ENTRIES IN 71 CIV. 1940:

Date	Proceedings
April 30, 1971	Filed complaint. Issued Summons.
May 28, 1971	Filed stipulation and order that the date on which defendant New York Stock Exchange Inc. is to answer the complaint is extended from June 1, 1971 to July 1, 1971. McGohey, J.
June 3, 1971	Filed stipulation and order that the time for defendant McDonnell & Co., Inc. to answer complaint is extended to June 14, 1971. So Ordered. Croake, J.
June 14, 1971	Filed stipulation and order that the time for defendant American Stock Exchange may answer to the complaint is extended from June 1, 1971 to June 21, 1971. So Ordered; Lasker, J.
June 15, 1971	Filed Notice of Motion re: Consolidate. Returnable June 29, 1971 (filed in 71 Civ. 1281.)
June 15, 1971	Filed memorandum in support of motion to consolidate. (Filed in 71 Civ. 1281).
June 16, 1971	Filed summons with Marshal's return. Served New York Stock Exchange by Robert W. Haack, by Gerald Clark, on May 11, 1971. Served the New York Stock Exchange, Inc. by Gerald Clark on May 11, 1971. Served the American Stock Exchange by H. Vernon Lee, Jr. on May 11, 1971. Served McDonnell & Co., Inc. by Altus on May 5, 1971.
June 21, 1971	Filed answer of McDonnell & Co., Inc. to complaint.
June 21, 1971	Filed stipulation and order that the time for defendant McDonnell & Co. Inc. to answer complaint is extended to June 21, 1971. So ordered. Gurfein, J.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
June 25, 1971	Filed stipulation and order that the time for defendant American Stock Exchange to answer complaint is extended from June 21, 1971 to July 2, 1971. So Ordered. McLean, J.
June 28, 1971	Filed plaintiffs' memorandum of law in opposition to motion to consolidate.
June 28, 1971	Filed affidavit in opposition to motion to consolidate, and proof of service. (Filed in 71 Civ. 1281).
June 28, 1971	Filed memorandum of law in opposition to motion to consolidate. (Filed in 71 Civ. 1281).
July 1, 1971	Filed stipulation and order that the time for defendants New York Stock Exchange, Inc. and American Stock Exchange, may answer with respect to complaint is extended until ten (10) days after the date on which the Court renders a decision on the pending motion by defendant New York Stock Exchange, Inc. So Ordered. Cannella, J.
July 20, 1971	Filed stipulation and order extending defendants American Stock Exchange, New York Stock Exchange and New York Stock Exchange, Inc.'s time to answer complaint to August 31, 1971. So ordered. Frankel, J.
August 4, 1971	Filed memo endorsed on motion filed June 15, 1971 -- Motion withdrawn in accordance with stipulation submitted and signed this day. So Ordered; Tenney, J.
August 4, 1971	Filed stipulation and order that motion of defendant New York Stock Exchange, Inc. for an order consolidating for all purposes, returnable August 3, 1971, is hereby withdrawn without prejudice, etc. So Ordered; Tenney, J.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
September 1, 1971	Filed answer of defendant New York Stock Exchange, Inc. to complaint.
September 2, 1971	Filed answer of defendant American Stock Exchange, to complaint.
October 20, 1971	Filed request for production of documents, etc.
November 17, 1971	Filed response of New York Stock Exchange, Inc. to request for production of documents.
December 1, 1971	Filed response of American Stock Exchange to request for production of documents.
December 10, 1971	Filed plaintiffs' notice of motion re: Produce and Inspect - returnable December 16, 1971.
December 10, 1971	Filed memorandum of law in support of plaintiffs' motion for relief under rule 37.
December 15, 1971	Filed stipulation that the return date of plaintiffs' motion is extended from December 16, 1971 to December 23, 1971.
December 22, 1971	Filed stipulation adjourning motion now returnable December 23, 1971 to January 6, 1972.
January 6, 1972	Filed memo endorsed on motion paper dated December 10, 1972 re: Motion Withdrawn. So Ordered: Pierce, J.
January 6, 1972	Filed stipulation withdrawing motion now returnable January 6, 1972. So Ordered: Pierce, J.
June 22, 1972	Filed order and stipulation substituting Proskauer Rose Goetz & Mendelsohn as attorneys for Receiver for McDonnell & Co. Inc., in place and stead of Weil, Gotshal & Manges. So ordered. Gurfein, J. (Mailed notice).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
August 3, 1972	Filed attorneys' for plaintiffs' change of address.
October 30, 1972	Filed stipulation and order for substitution of attorneys for defendant American Stock Exchange, Lord, Day & Lord, in place of Forsythe, McGovern, Pearson & Nash. Ryan, J.
March 6, 1973	Filed notice of deposition by plaintiffs upon defendant the New York Stock Exchange by Mr. Robert M. Bishop, VP.
March 28, 1973	Filed notice of deposition by defendant New York Stock Exchange Inc. upon plaintiff Anna McDonnell.
March 28, 1973	Filed defendant Exchanges request of plaintiffs for production of documents (First Set).
April 16, 1973	Filed order. Ordered that 71 Civil 1940 be consolidated into 71 Civil 461. Ryan, J. (M/N)
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Spies, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. David Fuchs, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Kaspareck, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr.Arning, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. F. Stock, by plaintiff.
April 19, 1973	Filed notice of deposition upon the New York Stock Exchange by Mr. Richard A. Greves, by plaintiff.
April 19, 1973	Filed notice of deposition upon Mr. McElroy, by plaintiff.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
April 19, 1973	Filed notice of deposition upon Mr. W. E. Jones, by plaintiff.
April 19, 1973	Filed notice of deposition upon Mr. Herb E. Schuette, by plaintiff.
April 19, 1973	Filed notice of deposition upon Mr. Lloyd W. McChesney, by plaintiff.
April 19, 1973	Filed notice of deposition upon Mr. Paul Fitzgerald, by plaintiff.
May 29, 1973	Filed notice of deposition upon Mr. Arning, by plaintiff. (Filed in 71 Civ. 461).
September 5, 1973	Filed plaintiffs' notice of deposition of S.E.C. by Mr. Joseph Barton on October 11, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition of Mr. Paul McDonald on October 4, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition of Mr. Tom Ford on October 3, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition of Mr. David Rome on September 25, 1973.
September 5, 1973	Filed plaintiffs' notice of deposition of American Stock Exchange by H. Vernon Lee, Jr. on September 18, 1973.
September 5, 1973	Filed response of plaintiff Margaret Mary McDonnell Murphy to first set of rule 33 interrogatories propounded by defendant New York Stock Exchange.
September 5, 1973	Filed response of plaintiff Anna M. McDonnell to first set of rule 33 interrogatories propounded by defendant New York Stock Exchange.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
September 5, 1973	Filed response of plaintiff James F. McDonnell, Jr., to first set of rule 33 interrogatories propounded by defendant New York Stock Exchange.
November 16, 1973	Filed defendant's New York Stock Exchange Inc. notice of deposition of Robert Murphy on November 30, 1973.
November 19, 1973	Pre-trial conference held.
November 26, 1973	Filed order that all discovery by all parties be completed by February 1, 1974. No further extensions will be granted. Ryan, J. (Mailed notice).
November 29, 1973	Pre-trial conference held by Ryan, J.
January 22, 1974	Mailed notice of reassignment.
February 22, 1974	Filed response and objections to plaintiffs' request for production of documents, by defendant New York Stock Exchange Inc.
April 3, 1974	Filed affidavit of David S. Dubin in opposition to the motion of the S.E.C. for a protective order barring production of specified documents, etc.
April 3, 1974	Filed plaintiffs' memorandum of law.
July 12, 1974	Filed memorandum of law in opposition to the SEC motions for a protective order and in support of plaintiffs' motion for an order directing the production of documents from a governmental agency.
February 11, 1975	Filed amended complaint with jury demand.
January 20, 1975	Filed answer of defendant (New York Stock Exchange) to amended complaint.
February 28, 1975	Filed plaintiffs' affidavit and notice of motion for consolidation for all purposes - returnable March 7, 1975.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
February 28, 1975	Filed plaintiffs' memorandum of law in support of motion for consolidation.
March 4, 1975	Filed answer of defendant McDonnell & Co. to amended complaint.
March 6, 1975	Filed stipulation and order extending time of Bruce M. Stargatt, as Receiver for defendant McDonnell & Co. to answer amended complaint to March 3, 1975--Owen, J.
March 10, 1975	Filed answer of defendant (American Stock Exchange) to amended complaint.
March 31, 1975	Filed response of New York Stock Exchange to request to admit.
April 4, 1975	Filed response of American Stock Exchange to request to admit.
July 9, 1975	Filed transcript of record of proceedings dated April 28, 1975; April 29, 1975; April 30, 1975; May 1, 1975; and May 2, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 12, 1975; May 13, 1975; May 14, 1975 and May 15, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 19, 1975; May 20, 1975; May 21, 1975; and May 22, 1975.
July 9, 1975	Filed transcript of record of proceedings dated May 5, 1975; May 6, 1975; May 7, 1975; May 8, 1975; and May 9, 1975.
September 12, 1975	Filed affidavit and notice of motion by defendant McDonnell & Co. Inc. for an order setting aside the verdict of the jury returned herein on May 21, 1975, etc., as indicated, returnable on September 26, 1975. Also filed in 71 Civ. 461.

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
September 12, 1975	Filed defendant's (McDonnell & Co., Inc.) memo.of law, etc., as indicated.
September 12, 1975	Filed defendant's (New York Stock Exchange) memo in opposition to plaintiffs' motion for judgment notwithstanding the verdict or a new trial. Also filed in 71 Civ. 460.
September 22, 1975	Filed stipulation and order that the return date of the motions indicated are extended to October 3, 1975, etc., as indicated. Owen, J.
September 29, 1975	Filed plaintiffs' preliminary requests to charge.
October 1, 1975	Filed memo of defendant New York Stock Exchange, Inc. in support of motion for summary judgment.
October 1, 1975	Filed trial memorandum of defendant New York Stock Exchange, Inc.
October 1, 1975	Filed reply memorandum of law in support of plaintiffs' motion under Rule 39 (b), etc., as indicated, and in opposition to defendant McDonnell & Co. Inc.'s motion. Filed in 71 Civ. 461.
December 8, 1975	Filed Opinion #43498 - Defendant's motion to set aside jury verdict or to reduce the damages is granted to the extent that the judgment awarded to plaintiff Margaret Murphy be reduced from $300,000 to $282,623 and the damages awarded to plaintiffs Anna McDonnell and James McDonnell, Jr. be reduced from $350,000 to $318,622. Plaintiffs are directed to submit a judgment on notice.....Owen, J. (Mailed notice). (Filed in 71 Civ. 461).
January 26, 1976	Filed plaintiffs' memorandum of law in support of proposed judgment. (Filed in 71 Civ. 461).

LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
March 26, 1976	Filed stipulation and order substituting James F. McDonnell, Jr. and Charles E. McDonnell as Executors of the Estate of Anna M. McDonnell as plaintiffs herein in the place of Anna M. McDonnell, deceased..... Owen, J.
May 12, 1976	Filed Judgment #76,442 - That plaintiff Margaret Mary McDonnell Murphy is awarded judgment against McDonnell & Co., Inc. in the sum of $282,623 plus interest in the sum of $45,911.49, totalling $328,534.49. That plaintiff James F. McDonnell, Jr. as Trustee under the Will of James F. McDonnell, is awarded judgment against McDonnell & Co., Inc. in the sum of $318,622 plus interest in the sum of $53,974.18, totalling $372,596.18. Ordered that defendant McDonnell & Co., Inc. is awarded judgment dismissing all the remaining claims against it in 71 Civ. 461 and 71 Civ. 1940. That defendant Amex (American Stock Exchange) is awarded judgment dismissing all the claims against it in 71 Civ. 1940, and that the defendant NYSE (New York Stock Exchange) is awarded judgment dismissing all the claims against it in 71 Civ. 461 and 71 Civ. 1940.....Owen, J. Judgment entered May 13, 1976..... Clerk. Entered May 13, 1976. (Filed in 71 Civ. 461). (Mailed notice).
June 22, 1976	Filed stipulation and order extending plaintiffs' time to transmit the record on appeal to the U.S.C.A. to September 8, 1976.....Owen, J.

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ORDER OF CONSOLIDATION

[Doc. 150]

[CAPTION]

71 Civ. 461 S.J.R.
71 Civ. 1940 S.J.R.

All parties in the above-captioned actions having appeared before the Court on March 29, 1973 for a pretrial conference and having agreed to consolidation of these actions, it is now hereby

ORDERED that the above-captioned actions be and the same hereby are consolidated and henceforth all papers herein shall bear the caption as hereinabove appears on this order.

Dated: New York, New York
April 13, 1973

/s/ Sylvester J. Ryan
U.S.D.J.

CONSENTED TO:

DAVIS & COX

By /s/Maxwell E. Cox
Attorneys for Plaintiffs
One State Street Plaza
New York, New York 10004

PROSKAUER, ROSE, GOETZ
& MENDELSOHN

By /s/ George G. Gallantz
Attorneys for McDonnell
& Co., Inc. and Receiver
Bruce M. Stargatt
300 Park Avenue
New York, New York

ORDER OF CONSOLIDATION

MILBANK, TWEED, HADLEY & McCLOY

By /s/Russell E. Brooks
Attorneys for Defendant
New York Stock Exchange, Inc.
1 Chase Manhattan Plaza
New York, New York 10005

LORD DAY & LORD

By /s/ John J. Loflin
Attorneys for American
Stock Exchange
25 Broadway
New York, New York 10005

A-3

MURPHY AMENDED COMPLAINT

[Doc. 174]

[CAPTION] 71 Civ. 461 R.O.

Plaintiff, by her attorneys Davis & Cox, for her complaint against the above-named defendants, alleges upon information and belief:

1. Plaintiff, Margaret Mary McDonnell Murphy ("Plaintiff") brings this action (a) to enforce liabilities and duties created under Section 17(a) of the Securities Act of 1933 ("the 1933 Act"), as amended (15 U.S.C. § 77q), Sections 6, 10, 15, 17 and 29 of the Securities Exchange Act of 1934 ("the 1934 Act"), as amended (15 U.S.C. §§ 78f, 78j, 78o, 78q and 78cc), the Rules and Regulations of the Securities and Exchange Commission ("the SEC") promulgated thereunder, and the laws of the several states, and (b) to obtain damages and other relief by reason of the violations of said Acts, Rules and Regulations, and laws, all as hereunder alleged. This Court has jurisdiction of this action under Section 22 of the 1933 Act (15 U.S.C. § 77v), Section 27 of the 1934 Act (15 U.S.C. § 78aa), 28 U.S.C. § 1331 and under its pendent jurisdiction.

2. Plaintiff is a citizen and resident of

the State of New Jersey. For some years prior to February, 1969, she maintained an account with defendant McDonnell & Co., Incorporated (McDonnell & Co.), a brokerage and investment banking firm. The value of the securities and cash in said account was approximately $400,000 in January, 1969.

3. Defendant McDonnell & Co. is, and at all relevant times has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in this District. At all relevant times until March, 1970, (a) it conducted a general securities business in this District and elsewhere, (b) was registered with the SEC under the 1934 Act as a broker and dealer in securities and (c) was a member corporation of the New York Stock Exchange. In March, 1970, McDonnell & Co. ceased doing a general securities business. Since that time it has been engaged in the liquidation of that business under the supervision and control of the New York Stock Exchange through a liquidator appointed by it. In April, 1970, the SEC revoked the broker-dealer registration of McDonnell & Co.

4. Defendant New York Stock Exchange (hereinafter "the Exchange") is, and at all relevant times has been, an unincorporated association of brokers and

dealers in securities, with its principal place of business in this District. Its president is Robert W. Haack. It is, and at all relevant times has been, a national securities exchange, registered as such with the SEC pursuant to the provisions of Section 6 (15 U.S.C. § 78f) of the 1934 Act. By reason of said registration and the provisions of said Section 6, and by reason of its Constitution and its Rules, the Exchange has, and at all relevant times had, the duty, inter alia:

(a) To comply, and to enforce so far as within its powers, compliance by its members, with the provisions of the 1934 Act;

(b) To asure that a member keep accurate and current records of its business transactions;

(c) To enforce compliance by its members with the Rules of the Exchange, including its rule as to net capital requirements;

(d) To review significant expenditures not in the ordinary course of business by a member and to approve such expenditures and the opening of branch offices by a member only when consistent with the protection of investors;

(e) To prevent false or misleading advertising or other public statements by a member;

(f) To take such steps, and to impose such restrictions, on the activities of a member as may be required for the protection of those who deal with its member firms; and

(g) To exercise general supervision over each of its members, in order to assure that the business of said member is being operated in a prudent manner and consistent with high standards of commercial honor and integrity.

5. The Exchange holds itself out to the public generally and to those who deal with its members in particular, as exercising a high degree of care with respect to the conduct of its business and that of its members and as supervising the activities of its members to the end that those who deal with its members will be protected against loss by reason of fraud or dishonest acts or unsound business practices of a member of the Exchange.

6. McDonnell & Co., for many years prior to 1967, was a medium-sized brokerage firm which in addition to its general brokerage business specialized

in making a market on the Exchange for rights offerings. In or about 1967 it entered upon a program of expansion pursuant to which it opened new branch offices, acquired at least one other brokerage firm, engaged in extensive advertising programs directed in part to the small investor and otherwise sought to increase its general brokerage business, including particularly its "retail" business. This program initially resulted in a significant increase in the volume of business which McDonnell & Co. transacted. The personnel and facilities of McDonnell & Co. were unable to handle this increased volume of business.

7. In connection with the aforesaid expansion program, and thereafter, McDonnell & Co. failed to take actions necessary to protect those who had accounts with it and acted in a manner contrary to the interests of those who dealt with it. By the end of 1968 the financial condition of McDonnell & Co. had deteriorated to the point that it was no longer a profitable business and its financial condition was precarious. Such deterioration took place for reasons which included:

(a) The inability of McDonnell & Co.'s back office to handle the expanded volume of

business which McDonnell & Co. had been transacting;

(b) The consequent failure of McDonnell & Co. to keep adequate or accurate books and records, with the result, inter alia, that the ownership of millions of dollars of securities was unknown or could not be ascertained from such books and records;

(c) Excessive costs; and

(d) One of the most inefficient operations among brokerage houses of comparable size.

8. During the period of McDonnell & Co.'s expansion and thereafter, the Exchange, in violation of the duties and obligations imposed upon it by Section 6 of the 1934 Act and contrary to the representations that it had made and contrary to its own Constitution and Rules, failed to exercise its supervisory and other powers over the business of McDonnell & Co., failed to take any action to prevent the aforesaid deterioration in the financial condition of McDonnell & Co. of which the Exchange was well aware, and permitted McDonnell & Co. to continue on a course of conduct which was not in the interests of those who dealt with it or consistent with high standards of commercial honor or integrity.

MURPHY AMENDED COMPLAINT

The Exchange, inter alia:

(a) Failed to insist and assure that McDonnell & Co. keep accurate and current records of its business transactions;

(b) Permitted McDonnell & Co. to acquire and to open new branch offices and otherwise to expand its business even though the Exchange knew, or in the exercise of reasonable prudence should have known, that the back office of McDonnell & Co. could not handle the volume of business generated by such expansion;

(c) Permitted McDonnell & Co. to engage in wasteful and extravagant expenditures not in the ordinary course of its business;

(d) Permitted McDonnell & Co. to continue extensive advertising to obtain new accounts and to increase the volume of its business even though the back office of McDonnell & Co., as the Exchange knew, or in the exercise of reasonable prudence should have known, could not handle the business McDonnell & Co. was then doing;

(e) Failed to prohibit false and deceptive public advertisements and statements by McDonnell & Co.;

(f) Failed to take appropriate steps to require McDonnell & Co. to correct the chaotic conditions existing in its back office operations; and

(g) Failed to impose appropriate restrictions on the operation of McDonnell & Co. until such time asthe difficulties in its back office operations had been corrected.

9. By reason of the losses incurred in the operation of its business and back office problems hereinabove alleged and by reason of the failure of the Exchange to perform the duties and obligations owed by it as hereinabove alleged, McDonnell & Co. by October 31, 1968, was unable to meet the net capital requirements of the Exchange if the capital of McDonnell & Co. were computed in accordance with the Rules of the Exchange. Although the Exchange knew or in the exercise of reasonable prudence should have known prior to the end of 1968 that McDonnell & Co. was in violation of the net capital requirements of the Exchange, it permitted McDonnell & Co. to continue the operation of its business notwithstanding such violation.

10. In or about January 1969, the then chief executive of McDonnell & Co. committed to the

Exchange that he would raise an additional $1.6 million of capital. Pursuant to this commitment, McDonnell & Co. sought to obtain from certain of its customers agreements by which they would subordinate any and all claims they might have to the securities in their accounts to the claims of present and future creditors of McDonnell & Co. (other than subordinated creditors) and in return therefor receive interest based upon the value of the accounts to be subordinated.

11. In January, 1969, a senior vice president of McDonnell & Co. telephoned plaintiff and requested that she enter into such a subordination agreement with McDonnell & Co. For the purpose of inducing her to accept such a subordination agreement, McDonnell & Co. through said senior vice president made to plaintiff the following representations, among others:

(a) That McDonnell & Co. was in sound financial condition;

(b) That the request that plaintiff enter into the subordination agreement was made because of an underwriting in which McDonnell & Co. would participate;

(c) That the need of McDonnell & Co. for additional capital was temporary and occasioned solely by such underwriting; and

(d) That no possibility existed that plaintiff would suffer any loss if she entered into the subordination agreement.

The representations made to plaintiff as herein alleged were false and were known by McDonnell & Co. and said senior vice president to be false.

12. In addition to making said false representations, McDonnell & Co., in order to obtain plaintiff's acceptance of said subordination agreement and for the purpose and with the intent of misleading plaintiff, failed to disclose material facts known to it and relevant to such an agreement. Included among the material facts which McDonnell & Co. so concealed from plaintiff were the following:

(a) That McDonnell & Co. had sustained a financial loss during 1968 in its brokerage business, which accounted for approximately 60% of McDonnell & Co.'s revenues during 1968;

(b) That McDonnell & Co. had sustained severe operating losses during the last four months of 1968;

(c) That the certified public accountants of McDonnell & Co. had recently completed its annual audit of McDonnell & Co., as of October 31, 1968, and had reported that if the capital of McDonnell & Co. were computed in accordance with the Rules of the Exchange, McDonnell & Co. would not meet the capital requirements of the Exchange;

(d) That although under the proposed arrangement plaintiff could withdraw securities from her subordinated account in certain circumstances (but only if the aggregate indebtedness of McDonnell & Co. would not exceed 1500 per centum of its net capital determined in accordance with the capital requirements rules and regulations of the Exchange in effect at the time of such withdrawal), the possibility of any such withdrawal in the foreseeable future was remote or non-existent;

(e) That a brokerage firm may not lawfully continue to operate when its capital ratio exceeds 20 to 1;

(f) That at the time the capital ratio of McDonnell & Co. exceeded 20 to 1 if the value of certain securities was computed in accordance with

the Rules of the Exchange;

(g) That the state of the back office operations of McDonnell & Co. was chaotic, that its books and records were maintained in such a way as to prevent effective and efficient operation of its business, that it lacked the necessary equipment, personnel and facilities to permit the efficient operation of its business; and

(h) That the chances of McDonnell & Co.'s resuming profitable operations in the foreseeable future were minimal.

13. In reliance on the false representations made to plaintiff as alleged in paragraph 11 hereof and in ignorance of the material facts concealed from her as alleged in paragraph 12 hereof, plaintiff in February, 1969, entered into a subordination agreement with McDonnell & Co. by the terms of which her account with McDonnell & Co. and any and all claims which she might have to the securities therein were subordinated to the claims of existing and future creditors of McDonnell & Co. (other than subordinated creditors).

14. In connection with the offering to plaintiff of the subordination agreement (which under

the Rules of the Exchange was subject to its approval) and the making thereof, the Exchange, in violation of the duties and obligations imposed upon it by Section 6 of the 1934 Act and otherwise, as hereinabove alleged and contrary to the representations made by it as hereinabove alleged, upon which plaintiff relied, aided and abetted McDonnell & Co. in the unlawful conduct hereinabove alleged, in the following respects, among others:

(a) It failed to require McDonnell & Co. to disclose all material facts to plaintiff in connection with said subordination agreement;

(b) It permitted McDonnell & Co. to make the false representations hereinabove alleged;

(c) It approved the subordination agreement even though it knew or should have known, in the exercise of reasonable prudence, that the acceptance by plaintiff of the subordination agreement had been procured by fraud as hereinabove alleged; and

(d) It approved the subordination agreement even though it knew or should have known, in the exercise of reasonable prudence, that the making of such agreement was contrary to plaintiff's

interests and not consistent with high standards of commercial honor and integrity on the part of McDonnell & Co.

15. Thereafter the business and affairs of McDonnell & Co. continued to deteriorate. The Exchange, however, permitted McDonnell & Co. to continue to operate, failed to insist that McDonnell & Co. take steps which might have resulted in a solution to the financial and other problems of McDonnell & Co., failed to require McDonnell & Co. to comply with the Rules of the Exchange, and permitted McDonnell & Co. to engage in short range expedients in order to continue in business until March, 1970, and otherwise failed and refused to carry out its duties and obligations to McDonnell & Co. and to its customers, all in violation of Section 6 of the 1934 Act and contrary to the representations it had made and contrary to its own Constitution and Rules.

16. Plaintiff was not advised that McDonnell & Co. was experiencing financial difficulties until the late summer of 1969. At that time she was requested by officers of McDonnell & Co. to enter into an agreement evidenced by a letter to the Exchange, between and among herself and others who had subordina-

ted accounts with McDonnell & Co. and certain of its voting shareholders for the purpose of having the Exchange lift certain restrictions which the Exchange had placed on the activities of McDonnell & Co. By the terms of this agreement 50% of the value of the securities subject to the subordination agreement were to be converted into preferred stock of McDonnell & Co. and the remainder, if necessary to comply with the Rules of the Stock Exchange, would be exchanged for a five year installment note of McDonnell & Co. Said agreement was proposed by McDonnell & Co. only after consultation between McDonnell & Co. and the Exchange, and only after the Exchange had agreed upon such recapitalization, to lift the restrictions which it had placed on the operations of McDonnell & Co.

17. In order to induce plaintiff to enter into the aforesaid agreement and to exchange securities in the account which had been subordinated by reason of the wrongful acts hereinabove alleged, for preferred stock of McDonnell & Co.:

(a) McDonnell & Co. represented to plaintiff, inter alia, that the resulting recapitalization would place McDonnell & Co. in compliance with the capital requirements of the Exchange and

would permit McDonnell & Co. to operate profitably. Such representations were false when made and were known to McDonnell & Co. to be false;

(b) McDonnell & Co. failed to disclose material facts in connection with the transaction it proposed, including the following:

(i) the book value of the preferred stock to be issued to plaintiff was zero or almost zero;

(ii) the financial condition of McDonnell & Co. as well as other conditions at McDonnell & Co. and conditions in the securities business were such that no reasonable probability existed that McDonnell & Co. would in the foreseeable future operate profitably; and

(iii) that McDonnell & Co. had incurred and was continuing to incur heavy financial losses.

18. Plaintiff, in reliance on the aforesaid representations and in ignorance of the aforesaid material facts, agreed to the aforesaid recapitalization.

MURPHY AMENDED COMPLAINT

19. The Exchange, which participated with McDonnell & Co. and aided and abetted McDonnell & Co. in obtaining plaintiff's consent to the aforesaid recapitalization, knew or in the exercise of reasonable care should have known of the false representations made to plaintiff and of the concealment by McDonnell & Co. of relevant facts, as hereinabove alleged, and the Exchange, in violation of its duties and obligations hereinabove alleged and the representations it had made, approved said recapitalization agreement.

20. In October, 1969, 50% in value of the securities in plaintiff's subordinated account were exchanged for preferred stock of McDonnell & Co. Thereafter, without her consent, McDonnell & Co. purported to exchange the remainder of said securities for a subordinated installment note of McDonnell & Co.

21. The aforesaid preferred stock of McDonnell & Co. and the aforesaid installment note are worthless.

22. The Exchange at all relevant times has repeatedly and continuously represented to the public generally and to customers of its member firms in particular that in the event of the insolvency of a member firm, it will make appropriate provision, either

through a trust fund which it has established or otherwise, that the customers of said firm shall not suffer any loss by reason of such insolvency.

23. On or about March 24, 1970, the Exchange entered into an agreement with McDonnell & Co., its directors and voting stockholders which provided, inter alia, for the appointment of a liquidator named by the Exchange. Such a liquidator was thereafter appointed by the Exchange. In December, 1970, plaintiff was advised by such liquidator that the indebtedness of McDonnell & Co. was such that plaintiff would receive nothing from McDonnell & Co. on account of the securities which were wrongfully subordinated as hereinabove alleged or by reason of the preferred stock or installment note of McDonnell & Co. for which such securities were wrongfully exchanged as hereinabove alleged.

24. Notwithstanding the representations that the Exchange has made as hereinabove alleged on which plaintiff relied, the Exchange has failed and refused to provide for and protect plaintiff against the loss which she has suffered by reason of the fraud and dishonest acts and by reason of the insolvency of McDonnell & Co.

25. In connection with the acts, practices and course of business which operated as a fraud and deceit upon plaintiff in the purchase and sale of securities as hereinabove alleged and the making of untrue statements of material facts and the omission to state material facts in connection with the purchases and sales of securities as hereinabove alleged, the defendants used means and instrumentalities of interstate commerce, including the telephone.

26. By reason of the unlawful conduct and acts hereinabove alleged, plaintiff has suffered damages in the amount of $400,000.

SECOND CLAIM ON BEHALF OF
MARGARET MARY McDONNELL MURPHY

27. Plaintiff realleges each and all of the allegations contained in paragraphs 1 through 25 of this Amended Complaint with like effect as if herein fully repeated.

28. The NYSE is, and at all relevant times has been, a national security exchange registered as such with the SEC pursuant to the provisions of Section 6 (15 U.S.C. § 78f) of the 1934 Act.

29. By reason of said registration and pursuant to said Section 6, the NYSE entered into a

contract with the SEC for the benefit and protection of investors.

30. Plaintiff Margaret Mary McDonnell Murphy, is an investor within the class for whose benefit and protection said contract was executed.

31. Pursuant to the aforesaid contract, the NYSE agreed to comply and enforce compliance by its members with the 1934 Act, the Rules and Regulations of the SEC promulgated thereunder and the Rules of the Exchange.

32. As more particularly alleged in paragraphs 4 through 25 of this Amended Complaint, the NYSE has knowingly and wilfully failed to exercise its remedial and disciplinary powers or to otherwise enforce compliance, in the face of repeated violations by the defendant McDonnell & Co. of the 1934 Act, the Rules and Regulations of the SEC promulgated thereunder and the Rules of the Exchange.

33. By reason of the aforesaid conduct, the NYSE has committed a direct and substantial breach of its contracts with the SEC which contract is for the benefit and protection of investors, including plaintiff Margaret Mary McDonnell Murphy.

34. By reason of the unlawful breach of

contract hereinabove alleged, plaintiff has sustained damages in an amount in excess of $400,000.

WHEREFORE, plaintiff demands judgment against the defendants on the First and Second Claims hereof:

(1) For damages in the amount of $400,000 together with interest thereon;

(2) For rescission of the subordination agreement described in paragraph 11 hereof and the recapitalization agreement described in paragraph 16 hereof;

(3) For the costs and disbursements of this action; and

(4) For such other and further relief as this Court may deem just and proper.

DAVIS & COX

By /s/Maxwell E. Cox
Maxwell E. Cox
A Member of the Firm
Attorneys for Plaintiff
Office & P.O. Address
One State Street Plaza
New York, N.Y. 10004
Tel. (212) 425-0500

Dated: New York, N. Y.
February 10, 1975.

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ANSWER OF NYSE TO MURPHY AMENDED COMPLAINT

[Doc. 175]

[CAPTION] 71 Civ. 461 (R.O.)

Defendant New York Stock Exchange, Inc., by its attorneys, Milbank, Tweed, Hadley & McCloy, for answer to the amended complaint:

1. Denies each and every allegation contained in paragraph 1, except admits that the action is purportedly brought pursuant to the designated statutes, rules, regulations, and laws of the several states, and that jurisdiction is alleged to exist pursuant to the designated statutes and pendent jurisdiction.

2. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2, except admits that plaintiff maintained an account with defendant McDonnell & Co. and denies that in January, 1969, the value of securities and cash in plaintiff's account was approximately $400,000.

3. Admits the allegations contained in paragraph 3, except denies that the liquidation of McDonnell & Co. has been under the supervision and control of the Exchange through a liquidator appointed by it.

ANSWER OF NYSE TO MURPHY AMENDED COMPLAINT

4. Denies each and every allegation contained in paragraph 4, except admits that at all relevant times herein the Exchange was an unincorporated association organized under the laws of the State of New York, registered as a national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934, with its principal place of business in this district and having as its president, Robert W. Haack, refers to said statute, the Exchange's Constitution and the Rules of its Board of Governors for a complete and accurate statement of the terms thereof, and alleges that on February, 1971, it became a not-for-profit corporation organized under the laws of the State of New York.

5. Denies each and every allegation contained in paragraph 5.

6. Denies each and every allegation contained in paragraph 7.

7. Denies each and every allegation contained in paragraphs 8 and 9.

8. Denies each and every allegation contained in paragraph 10, except admits that in or about January, 1969, the then chief executive of McDonnell & Co. committed to the Exchange that he would raise an additional

$1.6 million of capital and that subsequently certain of said executive's family, including plaintiff, entered into subordinated loan agreements with McDonnell & Co.

9. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 11, 12 and 13.

10. Denies each and every allegation contained in paragraph 14.

11. Denies each and every allegation contained in paragraph 15.

12. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 16, except admits that such an agreement was evidenced by such a letter to the Exchange, and denies that said agreement was proposed by McDonnell & Co. only after consultation with the Exchange and after the Exchange had agreed, upon such recapitalization, to lift the restrictions which it had placed on the operations of McDonnell & Co.

13. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 17 and 18.

14. Denies each and every allegation contained in paragraph 19.

ANSWER OF NYSE TO MURPHY AMENDED COMPLAINT

15. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 20 and 21.

16. Denies each and every allegation contained in paragraph 22.

17. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 23, except admits that on or about March 24, 1970, the Exchange entered into an agreement with McDonnell & Co., its directors and certain of its voting stockholders, which provided, among other things, for the appointment of a liquidator to be named by the Exchange and that such liquidator was thereafter appointed by the Exchange.

18. Denies each and every allegation contained in paragraph 24.

19. Denies each and every allegation contained in paragraph 25 as such allegations are directed against the Exchange, and denies knowledge or information sufficient to form a belief as to the truth of such allegations as they are directed against defendant McDonnell & Co.

20. Denies each and every allegation contained in paragraph 26 as such allegations are directed against

the Exchange, and denies knowledge or information sufficient to form a belief as to the truth of such allegations as they are directed against defendant McDonnell & Co.

21. Denies each and every allegation contained in paragraphs 29, 30, 31, 32, 33 and 34.

FOR A FIRST DEFENSE

22. Plaintiff lacks standing to assert the claims pleaded against the Exchange in the amended complaint.

WHEREFORE, defendant New York Stock Exchange, Inc. demands judgment dismissing the amended complaint, with costs and disbursements.

Dated: New York, New York
February 20, 1975

MILBANK, TWEED, HADLEY & McCLOY

By /s/ Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant
New York Stock Exchange, Inc.

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ANSWER OF McDONNELL & CO. TO MURPHY AMENDED COMPLAINT

[Doc. 177]

[CAPTION] 71 Civ. 461 (R.O.)

Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated ("McDonnell"), answering the amended complaint herein on behalf of said defendant:

1. Denies the allegations contained in paragraph 1 of the amended complaint, except admits that this action is alleged to be brought pursuant to the statutes, laws, sections and rules referred to therein and that jurisdiction of this Court is alleged under the statutes, laws, sections and rules referred to therein.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the amended complaint, except admits, upon information and belief, that for some years prior to February, 1969, plaintiff maintained an account with McDonnell, a brokerage and investment banking firm.

3. Denies so much of the allegations in paragraph 3 of the amended complaint as alleges that, since April 1971, McDonnell has been engaged in the liquidation

of McDonnell's general securities business under the supervision and control of the New York Stock Exchange through a liquidator appointed by said Exchange.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of the amended complaint.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the amended complaint, except admits, on information and belief, the allegations contained in the first sentence thereof.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 7, 8, 9, 10, 11 and 12 of the amended complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the amended complaint, except admits that plaintiff as of February 4, 1969, entered into a written agreement with McDonnell and respectfully refers the Court to the terms, provisions and contents thereof.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations con-

tained in paragraphs 14 and 15 of the amended complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the amended complaint, except admits that on or about September 30, 1969, plaintiff entered into a certain agreement in writing relating to plaintiff's account maintained with McDonnell and respectfully refers the Court to the terms, provisions and contents thereof.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 17, 18 and 19 of the amended complaint.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the amended complaint, except admits, upon information and belief, that during October, 1969, 50% in value of the securities in plaintiff's subordinated account were exchanged for preferred stock of McDonnell with the express consent and approval of plaintiff. Upon information and belief, thereafter, again with plaintiff's express knowledge, consent, approval and agreement, the remaining securities in plaintiff's subordinated account were exchanged for a

five-year subordinated installment obligation of McDonnell.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 21 and 22 of the amended complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in the third sentence of paragraph 23 of the amended complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 24, 25 and 26 of the amended complaint.

15. In response to paragraph 27 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1 through 26 of the amended complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 28, 29, 30, 31, 32, 33 and 34 of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. The allegations of the amended complaint fail to state a claim upon which relief may be granted

against McDonnell.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. Upon information and belief, plaintiff is the sister of T. Murray McDonnell, who was at all times mentioned in the amended complaint the Chief Executive Officer of McDonnell, and plaintiff was fully informed and advised and, in fact, had full knowledge of the financial, operational and business conditions of McDonnell throughout said period.

19. Upon information and belief, plaintiff entered into the subordination agreement referred to in the amended complaint with full knowledge of the financial, operational and business conditions of McDonnell existing at that time and thereby has waived her rights and claims sued upon in the amended complaint herein and is barred and estopped from asserting said rights and claims.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

20. Each and every allegation contained in the above paragraph 18 is repeated and realleged with the same force and effect as though fully stated herein.

21. Upon information and belief, plaintiff had full knowledge of, and consented to any and all

transactions and occurrences relating to her account maintained with McDonnell and thereby has waived and is barred and estopped from asserting any and all rights or claims with respect thereto.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

22. Each and every allegation contained in the above paragraph 18 is repeated and realleged with the same force and effect as though fully stated herein.

23. Upon information and belief, any and all transactions and occurrences relating to plaintiff's account with McDonnell subsequent to the execution of the subordination agreement referred to in the amended complaint were in full and complete compliance with the terms and conditions of said agreement.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

24. Each and every allegation contained in the above paragraph 18 is repeated and realleged with the same force and effect as though fully stated herein.

25. Upon information and belief, any and all transactions and occurrences relating to plaintiff's account with McDonnell subsequent to the execution of the subordination agreement referred to in the amended complaint were expressly agreed to and in full and

complete compliance with said agreements.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

26. Upon information and belief, with full knowledge of all the facts and acts of the defendants as set forth in the complaint and amended complaint, plaintiff refrained from commencing this action until the 11th day of February, 1971 and has thereby been guilty of such laches as should in equity bar the plaintiff from maintaining this action.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

27. Plaintiff's complaint and amended complaint are barred by the applicable statutes of limitations.

WHEREFORE, Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated demands judgment dismissing the amended complaint as to it, together with the costs and disbursements of this action.

Dated: March 3, 1975

PROSKAUER ROSE GOETZ & MENDELSOHN

By /s/ George G. Gallantz
George G. Gallantz
A Member of the Firm
Attorneys for Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated
300 Park Avenue
New York, N. Y. 10022
(212-593-9000)

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McDONNELL AMENDED COMPLAINT

[Doc. 203]

[CAPTION] 71 Civ. 1940 R.O.

Plaintiffs, by their attorneys, Davis & Cox, for their complaint against the above named defendants, allege upon information and belief:

JURISDICTION

1. Each of the claims alleged herein arises under the Securities Act of 1933 ("the 1933 Act"), as amended, 15 U.S.C. §§ 77a et seq., the Securities Exchange Act of 1934 ("the 1934 Act"), as amended, 15 U.S.C. §§ 78a et seq., the Rules and Regulations of the Securities and Exchange Commission ("the SEC") promulgated thereunder, and the laws of the several states. This Court has jurisdiction of this action under Section 22 of the 1933 Act (15 U.S.C. § 77v), Section 27 of the 1934 Act (15 U.S.C. § 78aa), and under its pendent jurisdiction.

FIRST CLAIM ON BEHALF OF
ANNA M. McDONNELL, INDIVIDUALLY

2. Plaintiff Anna M. McDonnell (hereinafter referred to as "plaintiff" in the FIRST CLAIM) is a citizen and resident of the State of New York.

McDONNELL AMENDED COMPLAINT

3. Defendant The New York Stock Exchange (hereinafter "the NYSE") was at all relevant times an unincorporated association of brokers and dealers in securities having its principal place of business in this District. In February, 1971, the NYSE became a not-for-profit corporation organized under the laws of the State of New York.

4. Defendant The American Stock Exchange (hereinafter "the AMEX") is and at all relevant times was an unincorporated association of brokers and dealers in securities having its principal place of business in this District.

5. The NYSE and the AMEX, for the purpose of inducing persons to deal with their members hold themselves out to the public generally and to those who deal with their members in particular, as exercising a high degree of care with respect to the conduct of their business and that of their members and as supervising the activities of their members to the end that those who deal with their members will be protected against loss by reason of fraud or dishonest acts or unsound business practice of their members.

6. The NYSE and the AMEX are and at all relevant times have been national securities exchanges registered as such with the SEC pursuant to the provisions of Section 6 (15 U.S.C. § 78f) of the 1934 Act.

By reason of said registration and the provisions of said Section 6, and by reason of their respective Constitutions and Rules, the NYSE and the AMEX each has, and at all relevant times had, the duty, inter alia:

(a) To comply, and to enforce so far as within their powers, compliance by their members, with the provisions of the 1934 Act;

(b) To assure that each of their members keeps accurate and current records of its business transactions;

(c) To enforce compliance by their members with their Rules, including their rules as to net capital requirements;

(d) To review significant expenditures not in the ordinary course of business by their members and to approve such expenditures and the opening of branch offices by their members only when consistent with the protection of investors;

(e) To prevent false or misleading advertising or other public statements by their members;

(f) To take such steps, and to impose such restrictions, on the activities of their members as may be required for the protection of those who deal with their members; and

(g) To exercise general supervision over each

of their members, in order to assure that the business of each member is being operated in a prudent manner and consistent with high standards of commercial honor and integrity.

7. Defendant McDonnell & Co., Inc. (hereinafter "McDonnell & Co.") is, and at all relevant times has been a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in this District. At all relevant times until March, 1970, it (a) conducted a general securities business in this District and elsewhere, (b) was registered with the SEC under the 1934 Act as a broker and dealer in securities and (c) was a member corporation of the NYSE and the AMEX. In March, 1970, McDonnell & Co. ceased doing a general securities business. Since that time it has been engaged in the liquidation of that business.

8. The NYSE and the AMEX are, and at all relevant times have been, in control of McDonnell & Co.

9. McDonnell & Co., for many years prior to 1967, was a medium-sized brokerage firm which, in addition to its general brokerage business, specialized in making a market for rights offerings.

10. In June, 1965, plaintiff entered into a written agreement with McDonnell & Co., having a

Maturity Date of June 30, 1966, pursuant to which certain securities of plaintiff were held in an account at McDonnell & Co., which securities and account were subordinated to the claims of creditors of McDonnell & Co. arising prior to June 30, 1966, and whereby plaintiff agreed to certain restrictions on her right to withdraw securities from said account until said Maturity Date. Thereafter, from about August, 1965, until June 30, 1966, securities having a market value in excess of $800,000 were held in a "subordinated account" subject to that agreement. Subsequent to June 30, 1966, the said securities were retained in the same account.

11. In or about 1967, McDonnell & Co. entered upon a program of expansion pursuant to which it opened new branch offices, acquired at least one other brokerage firm, engaged in extensive advertising programs directed in part to the small investor and otherwise sought to increase its general brokerage business, including particularly its "retail" business. This program initially resulted in a significant increase in the volume of business which McDonnell & Co. transacted. The personnel and facilities of McDonnell & Co. were unable to handle this increased volume of business.

McDONNELL AMENDED COMPLAINT

12. In connection with the aforesaid expansion program, and thereafter, McDonnell & Co. failed to take actions necessary to protect those who had accounts with it and acted in a manner contrary to the interests of those who dealt with it. By the end of 1968 the financial condition of McDonnell & Co. had deteriorated to the point that it was no longer a profitable business and its financial condition was precarious. Such deterioration took place for reasons which included:

(a) The inability of McDonnell & Co.'s back office to handle the expanded volume of business which McDonnell & Co. had been transacting;

(b) The consequent failure of McDonnell & Co. to keep adequate or accurate books and records with the result,, inter alia, that the ownership of millions of dollars of securities was unknown or could not be ascertained from such books and records;

(c) Excessive costs; and

(d) One of the most inefficient operations among brokerage houses of comparable size.

13. During the period of McDonnell & Co.'s expansion and thereafter, the NYSE and the AMEX, in

violation of the duties and obligations imposed upon them by Section 6 of the 1934 Act and contrary to the representations that they had made and contrary to their own Constitutions and Rules, failed to exercise their supervisory and other powers over the business of McDonnell & Co., failed to take any action to prevent the aforesaid deterioration in the financial condition of McDonnell & Co. of which they were well aware, and permitted McDonnell & Co. to continue on a course of conduct which was not in the interests of those who dealt with it or consistent with high standards of commercial honor or integrity. The NYSE and the AMEX, inter alia:

(a) Failed to insist and assure that McDonnell & Co. keep accurate and current records of its business transactions;

(b) Permitted McDonnell & Co. to acquire and to open new branch offices and otherwise to expand its business even though they knew, or in the exercise of reasonable prudence should have known, that the back office of McDonnell & Co. could not handle the volume of business generated by such expansion;

(c) Permitted McDonnell & Co. to engage in wasteful and extravagant expenditures not

in the ordinary course of its business;

(d) Permitted McDonnell & Co. to continue extensive advertising to obtain new accounts and to increase the volume of its business even though the back office of McDonnell & Co., as the NYSE and the AMEX knew, or in the exercise of reasonable prudence should have known, could not handle the business McDonnell & Co. was then doing;

(e) Failed to halt or prohibit the dissemination by McDonnell & Co. of false and deceptive public advertisements and statements by McDonnell & Co.;

(f) Failed to take appropriate steps to require McDonnell & Co. to correct the chaotic conditions existing in the back office operations; and

(g) Failed to impose appropriate restrictions on the operation of McDonnell & Co. until such time as the difficulties in its back office operations had been corrected.

14. By reason of the losses incurred in the operation of its business and back office problems hereinabove alleged and by reason of the failure of the NYSE and the AMEX to perform the duties and obligations owed by them as hereinabove alleged, McDonnell & Co. by

October 31, 1968, was unable to meet the net capital requirements of the NYSE and the AMEX if the capital of McDonnell & Co. were computed in accordance with their Rules. Although the NYSE and the AMEX knew or in the exercise of reasonable prudence should have known prior to the end of 1968 that McDonnell & Co. was in violation of their net capital requirements, they permitted McDonnell & Co. to continue the operation of its business notwithstanding such violation.

15. In or about January 1969, McDonnell & Co. committed to the NYSE that McDonnell & Co. would raise an additional $1.6 million of capital. Pursuant to this commitment McDonnell & Co. sought to obtain from certain of its customers agreements by which they would subordinate any and all claims they might have to the securities in their accounts to the claims of present and future creditors of McDonnell & Co. (other than subordinated creditors).

16. In January 1969, pursuant to its commitment to the NYSE, McDonnell & Co. requested that plaintiff loan certain securities to McDonnell & Co. and in return receive interest payments.

17. McDonnell & Co., in order to obtain plaintiff's agreement to enter into the aforesaid arrangement and for the purpose and with the intent

of misleading plaintiff, failed to disclose material facts known to it and relevant to such an agreement. Included among the material facts which McDonnell & Co. failed to disclose to plaintiff were the following:

(a) That McDonnell & Co. had sustained a financial loss during 1968 in its brokerage business, which business accounted for approximately 60% of McDonnell & Co.'s revenues during 1968;

(b) That McDonnell & Co. had sustained severe operating losses during the last four months of 1968;

(c) That the certified public accountants of McDonnell & Co. had recently completed an audit of McDonnell & Co., as of October 31, 1968, and had reported that if the capital of McDonnell & Co. were computed in accordance with the Rules of the NYSE, McDonnell & Co. would not meet the capital requirements of the NYSE;

(d) That a brokerage firm may not lawfully continue to operate when its capital ratio exceeds 20 to 1;

(e) That at the time the capital ratio of McDonnell & Co. exceeded 20 to 1 if the value of certain securities was computed in accordance with

the Rules of the NYSE and the AMEX;

(f) That the state of the back office operations of McDonnell & Co. was chaotic, that its books and records were maintained in such a way as to prevent effective and efficient operation of its business, that it lacked the necessary equipment, personnel and facilities to permit the efficient operation of its business;

(g) That the chances of McDonnell & Co.'s resuming profitable operations in the foreseeable future were minimal; and

(h) That there was a substantial possibility if not probability (1) that McDonnell & Co. would not be able to operate its business so as to comply with the net capital requirements of the NYSE and AMEX and (2) that securities loaned to McDonnell & Co. pursuant to subordinated arrangements would be (i) liquidated or otherwise disposed of in whole or in part by McDonnell & Co. by reason of its financial problems or to comply with the capital requirements of the NYSE and AMEX, or (ii) unable to be withdrawn by reason of the financial problems of McDonnell & Co.

18. In ignorance of the material facts not disclosed to her, as hereinabove alleged, plaintiff in

January, 1969, agreed to lend to McDonnell & Co. securities having a market value in excess of $800,000.00. Thereafter, the aforesaid securities of plaintiff were deposited in plaintiff's subordinated account at McDonnell & Co.

19. In connection with the offering and the acceptance of the aforesaid loan arrangement, the NYSE and the AMEX, in violation of the duties and obligations imposed upon them by Section 6 of the 1934 Act and otherwise, as hereinabove alleged, and contrary to the representations made by them as hereinabove alleged, aided and abetted McDonnell & Co. in the unlawful conduct hereinabove alleged, in the following respects, among others:

(a) They failed to require McDonnell & Co. to disclose all material facts to plaintiff in connection with said loan arrangement, even though said facts were known to them, and even though they knew or should have known that McDonnell & Co. had failed to disclose said facts;

(b) They failed to require McDonnell & Co. to advise plaintiff of the terms of the proposed loan arrangement, including her rights to terminate said arrangement and to withdraw securities subject thereto; and

(c) They permitted McDonnell & Co. to consummate the aforesaid loan arrangement, even though they knew or should have known, in the exercise of reasonable prudence, that (i) the acceptance by plaintiff of the aforesaid arrangement had been procured by the wrongful and unlawful conduct hereinabove alleged and (ii) that the making of such arrangement was contrary to plaintiff's interests and not consistent with high standards of commercial honor and integrity on the part of McDonnell & Co. as a member firm.

20. After January, 1969, the business and affairs of McDonnell & Co. continued to deteriorate. The NYSE and the AMEX, however, permitted McDonnell & Co. to continue to operate, failed to insist that McDonnell & Co. take steps which might have resulted in a solution to the financial and other problems of McDonnell & Co., failed to require McDonnell & Co. to comply with their Rules and permitted McDonnell & Co. to engage in short range expedients in order to continue in business until March, 1970, and otherwise failed and refused to carry out their duties and obligations to McDonnell & Co. and to those who dealt with McDonnell & Co., including plaintiff, all in violation of Section 6 of the 1934 Act and contrary to the

representations they had made and contrary to their own Constitutions and Rules.

21. In the summer of 1969, plaintiff was advised that McDonnell & Co. was experiencing serious financial difficulties and was requested by McDonnell & Co. to enter into an agreement evidenced by a letter to the NYSE for the purpose of having the NYSE lift certain restrictions which the NYSE had placed on the activities of McDonnell & Co. By the terms of this agreement 50% of the value of the securities in plaintiff's subordinated account was to be converted into preferred stock of McDonnell & Co. and the remainder, if necessary to comply with the Rules of the NYSE, could be exchanged for a five year installment note of McDonnell & Co. Said agreement was proposed by McDonnell & Co. after consultation between McDonnell & Co. and the NYSE, and after the NYSE had agreed upon such recapitalization, to lift the restrictions which it had placed on the operations of McDonnell & Co.

22. In order to induce plaintiff to enter into the aforesaid agreement and to exchange securities which had been deposited in the subordinated account by reason of the wrongful acts hereinabove alleged, for preferred stock of McDonnell & Co., McDonnell & Co. failed to disclose material facts in connection with

the transaction it proposed, including the following:

(a) the terms of and plaintiff's rights under the arrangement whereby she had loaned her securities to McDonnell & Co., including plaintiff's right to terminate said arrangement and withdraw the securities subject thereto;

(b) the financial condition of McDonnell & Co. as well as other conditions at McDonnell & Co. and conditions in the securities business were such that no reasonable probability existed that McDonnell & Co. would in the foreseeable future operate profitably; and

(c) there was a substantial possibility if not probability that McDonnell & Co. would not be able to operate its business so as to comply with the net capital requirements of the NYSE and the AMEX.

Plaintiff, in ignorance of the aforesaid material facts, agreed to the aforesaid recapitalization.

23. The NYSE and the AMEX aided and abetted McDonnell & Co. in obtaining plaintiff's consent to the aforesaid recapitalization in that, among other things, they did not require McDonnell & Co. to disclose the aforesaid material facts and they permitted McDonnell & Co. to accomplish the recapitalization although they

knew or should have known of the aforesaid failure of McDonnell & Co. to disclose relevant facts.

24. On or about October 15, 1969, there was issued to plaintiff 69,188 shares of the Second Preferred Stock of McDonnell & Co. in exchange for securities, constituting 50% of value of the securities in plaintiff's subordinated account having a market value at said time of approximately $690,000. At that time the value of the preferred stock was zero or near zero.

25. At some time thereafter, McDonnell & Co. wrongfully and unlawfully converted the remainder of said securities having a market value in excess of $650,000 at said time, and issued in exchange for them a subordinated installment note of McDonnell & Co. The aforesaid subordinated installment note was worthless at the time of its issuance. NYSE and AMEX knew or should have known of the aforesaid wrongful and unlawful action of McDonnell & Co., but they nevertheless permitted McDonnell & Co. to accomplish same.

26. In or about March, 1970, the NYSE entered into an agreement with McDonnell & Co., its directors and voting stockholders which provided, inter alia, for the appointment of a liquidator named by the NYSE. In December, 1970, plaintiff was advised by such liquidator that the indebtedness of McDonnell & Co. was

such that plaintiff would receive nothing from McDonnell & Co. on account of the securities which were wrongfully subordinated as hereinabove alleged or by reason of the preferred stock or installment note of McDonnell & Co. for which such securities were wrongfully exchanged as hereinabove alleged.

27. The NYSE and the AMEX at all relevant times have repeated and continuously represented to the public generally and to persons who deal with their member firms in particular that in the event of the insolvency of a member firm, they will make appropriate provision, either through a trust fund which they have established or otherwise, that those who deal with their member firms shall not suffer any loss by reason of such insolvency.

28. Notwithstanding the representations that the NYSE and the AMEX have made as hereinabove alleged, they have failed and refused to provide for and protect plaintiff against the loss which she has suffered by reason of the fraud and wrongful acts hereinabove alleged.

29. By their conduct as aforesaid, the NYSE, the AMEX and McDonnell & Co. violated, inter alia, Sections 12 (2) and 17 (a) of the 1933 Act and Sections 6, 10, 15, 17 and 29 of the 1934 Act and the Rules and

Regulations promulgated thereunder.

30. In connection with the acts, practices and course of business which operated as a fraud and deceit upon plaintiff in the purchase and sale of securities as hereinabove alleged and the making of untrue statements of material facts and the omission to state material facts in connection with the purchase and sales of securities as hereinabove alleged, the defendants used means and instrumentalities of interstate commerce; this action is brought within one year of the discovery by plaintiff of the fraud hereinabove alleged.

31. By reason of the unlawful acts and misconduct hereinabove alleged, plaintiff has sustained damages in an amount in excess of $1,400,000.

SECOND CLAIM ON BEHALF OF
ANNA M. McDONNELL, INDIVIDUALLY

32. Plaintiff Anna M. McDonnell (hereinafter referred to as "plaintiff" in the second claim) realleges each and all of the allegations contained in paragraphs 1 through 30 of this amended complaint with like effect as if here fully repeated.

33. The NYSE and the AMEX are and at all relevant times have been national securities exchanges registered as such with the SEC pursuant to the provisions of Section 6 (15 U.S.C. § 78f) of the 1934 Act.

34. By reason of said registration and pursuant to said Section 6, the NYSE and the AMEX each entered into a contract with the SEC for the benefit and protection of investors.

35. Plaintiff is an investor within the class for whose benefit and protection said contract was executed.

36. Pursuant to the aforesaid contract, the NYSE and the AMEX each agreed to comply and enforce compliance by their respective members with the 1934 Act, the Rules and Regulations of the SEC promulgated thereunder and the Rules of the respective Exchanges.

37. As more particularly alleged in paragraphs 5 through 30 of this amended complaint, the NYSE and the AMEX have knowingly and wilfully failed to exercise their respective remedial and disciplinary powers or to otherwise enforce compliance, in the face of repeated violations by the defendant McDonnell & Co. of the 1934 Act, the Rules and Regulations of the SEC promulgated thereunder and the Rules of the respective Exchanges.

38. By reason of the aforesaid conduct, the NYSE and the AMEX have each committed a direct and substantial breach of their respective contracts with the SEC which contracts are for the benefit and protection

of investors, including plaintiff.

39. By reason of the unlawful breach of contract hereinabove alleged, plaintiff has sustained damages in an amount in excess of $1,400,000.

THIRD CLAIM ON BEHALF OF
JAMES McDONNELL, JR., INDIVIDUALLY

40. Plaintiff James F. McDonnell, Jr. (hereinafter referred to as "plaintiff" in this THIRD CLAIM) is a resident and citizen of Michigan, and brings this claim on his own behalf. Plaintiff realleges each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, and 20 of this Amended Complaint with like effect as if herein fully repeated.

41. In March, 1969, plaintiff agreed to assume the position of Branch Manager of McDonnell & Co.'s Detroit office. Thereafter, McDonnell & Co., as part of an attempt to comply with the net capital requirements of the NYSE and the AMEX contacted plaintiff and asked him to purchase McDonnell & Co.'s voting common stock. For the purpose of inducing plaintiff to purchase said stock, McDonnell & Co. through a senior vice president, made to plaintiff the following representations, among others:

(a) In order to manage the Detroit office plaintiff would have to qualify as an "allied

member" of the NYSE, and in order for plaintiff to become an allied member of the NYSE he would have to purchase at least 300 shares of McDonnell & Co.'s voting common stock;

(b) The book value of the said stock was approximately $74.00 per share;

(c) McDonnell & Co. was in sound financial condition; and

(d) The said stock was a good investment for plaintiff.

The representations made to plaintiff as herein alleged were false and were known by McDonnell & Co. and said senior vice president to be false.

42. In addition to making said false representations, McDonnell & Co., in order to induce plaintiff to purchase said common s tock and for the purpose and with the intent of misleading plaintiff, failed to disclose certain material and relevant facts known to it and instead furnished to plaintiff certain information that was, to the knowledge of McDonnell & Co., false and misleading in the following material respects, among others:

(a) A Profit & Loss Statement furnished to plaintiff portrayed 1968 earnings by showing a profit through August 30, 1968, of $950,862.00

compared with a total annual profit for all of 1967 of $1,085,076.00 and a Prospectus furnished to plaintiff dated October, 1968, stated that "after tax profit of the Company has been maintained at 4.4% of income" despite substantial expansion and increased cost; however, McDonnell & Co. did not disclose that it had sustained large operating losses during the last four months of 1968, that it had sustained a net loss during 1968 in its brokerage business, or that its total profits for the year ending December 31, 1968, totalled $414,000;

(b) The material furnished to plaintiff contained a calculation of the net capital of McDonnell & Co. within the capital requirements of the NYSE and the AMEX, although later and less favorable calculations of the net capital of McDonnell & Co. were not included;

(c) McDonnell & Co. did not disclose that the state of its back office operations was chaotic, that its books and records were maintained in such a way as to prevent effective and efficient operation of its business, and that it lacked the necessary equipment, personnel and facilities to permit the efficient operation of its business; and

(d) McDonnell & Co. did not disclose that its chances of resuming profitable operations in the foreseeable future were minimal.

43. In reliance on the false representations made to him and in ignorance of the material facts concealed from him and of the false and misleading nature of the information supplied to him as hereinabove alleged, plaintiff in May, 1969, purchased 300 shares of the common stock of McDonnell & Co. at the purchase price of $69.06 per share.

44. Under the Rules of the NYSE and the AMEX, the aforesaid sale of common stock of McDonnell & Co. was subject to their approval. In connection with the aforesaid offer and sale to plaintiff of the said common stock of McDonnell & Co. the NYSE and the AMEX in violation of the duties and obligations imposed upon them by Section 6 of the 1934 Act and otherwise, as hereinabove alleged, and contrary to the representations made by them as hereinabove alleged, upon which plaintiff relied, aided and abetted McDonnell & Co. in the unlawful conduct hereinabove alleged, in the following respects, among others:

(a) They failed to require McDonnell & Co. to disclose all material facts to plaintiff in connection with said offer, although they knew

or should have known that said facts had not been disclosed to plaintiff;

(b) They permitted McDonnell & Co. to make the false representations hereinabove alleged, although they knew or should have known that said representations were being made and of the falsity thereof;

(c) They approved the purchase of said stock by plaintiff even though they knew or should have known (i) that the purchase of said stock by plaintiff had been procured by fraud as hereinabove alleged, and (ii) that the purchase of said stock by plaintiff was not consistent with high standards of commercial honor and integrity on the part of McDonnell & Co.

45. As a direct result of the aforesaid wrongful and unlawful conduct, including the failure by the NYSE and the AMEX to fulfill their duties and obligations under Section 6 of the 1934 Act, as hereinabove alleged, the stock of McDonnell & Co. purchased by plaintiff as aforesaid became and is worthless.

46. By their conduct as aforesaid the NYSE and the AMEX and McDonnell & Co. violated, inter alia, Section 17(a) of the 1933 Act, Sections 6, 10, 15 and 17 of the 1934 Act, and the Michigan Uniform Securities Act.

47. In connection with the acts, practices and course of business which operated as a fraud and deceit upon plaintiff in the purchase and sale of securities as hereinabove alleged and the making of untrue statements of material facts and the omission to state material facts in connection with the purchase and sale of securities as hereinabove alleged, the defendants used means and instrumentalities of interstate commerce. Plaintiff ha had to employ an attorney to bring this action, and pursuant to Section 410 of the Michigan Uniform Securities Act (Michigan Compiled Laws § 451.810) defendants are liable to pay plaintiff's reasonable attorneys' fees.

48. Plaintiff has suffered damages in the amount of $20,718.00 by reason of the unlawful conduct and acts hereinabove alleged, and has incurred liabilities for attorneys' fees in connection with this action.

FOURTH CLAIM ON BEHALF OF
JAMES McDONNELL, JR., INDIVIDUALLY

49. Plaintiff James McDonnell, Jr. (hereinafter referred to as "plaintiff" in this FOURTH CLAIM) realleges each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, 20, 33, 34, 36, and 40 through 48 of this Amended Complaint with

like effect as if here fully repeated.

50. Plaintiff James McDonnell, Jr. is an investor within the class for whose benefit and protection the contracts between the NYSE and the SEC and between the AMEX and the SEC were executed pursuant to Section 6 (15 U.S.C. § 78(f)) of the 1934 Act.

51. As more particularly alleged in paragraphs 9, 11 through 14, 20, and 40 through 46 of this Amended Complaint, the NYSE and the AMEX have knowingly and wilfully failed to exercise their respective remedial and disciplinary powers, or to otherwise enforce compliance, in the face of repeated violations by defendant McDonnell & Co. of the 1934 Act, the Rules and Regulations of the SEC, promulgated thereunder, and the Rules of the respective Exchanges.

52. By reason of the aforesaid conduct the NYSE and the AMEX have each committed a direct and substantial breach of their respective contracts with the SEC, which contracts are for the benefit and protection of investors, including plaintiff James F. McDonnell, Jr.

53. By reason of the unlawful breach hereinabove alleged, plaintiff has suffered damages in the amount of $20,718.00.

54. By reason of the unlawful breach herein-

above alleged, plaintiff has had to retain an attorney to bring this action and has incurred liabilities for attorneys' fees in connection with the action.

FIFTH CLAIM ON BEHALF OF
ANNA M. McDONNELL AS EXECUTRIX AND TRUSTEE
AND JAMES McDONNELL, JR. AS TRUSTEE

55. Plaintiff Anna M. McDonnell is the executrix of the estate of James F. McDonnell, who died on July 10, 1958. Plaintiff Anna M. McDonnell and plaintiff James F. McDonnell, Jr. are two of the trustees appointed by the Will of James F. McDonnell to administer a residuary trust created by that Will, and as such are duly authorized to bring this action. The term "plaintiffs" as used in this FIFTH CLAIM and in the SIXTH, SEVENTH, AND EIGHTH CLAIMS refers to Anna M. McDonnell and James F. McDonnell, Jr., acting in their fiduciary capacities as aforesaid.

56. Plaintiffs repeat and reallege each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, and 20 of this Amended Complaint with like effect as if herein fully repeated.

57. For some time prior to 1967, the Estate of James F. McDonnell owned a Registered Subordinated Debenture Series B of McDonnell & Co. in the amount of $318,622.97 due December 31, 1968, (the "Series B Debenture") under which the obligation of McDonnell

& Co. was until its maturity subordinated to the claims of creditors of McDonnell & Co. In or about October, 1968, plaintiff Anna M. McDonnell, as the executrix of the Estate, distributed the Series B Debenture to the trustees under the Will of James F. McDonnell. Thereafter, McDonnell & Co. failed to pay the principal sum owed to the trust estate upon the due date of the aforesaid Series B Debenture.

58. In or about January, 1969, McDonnell & Co., as a result of its inability to meet the net capital requirements of the NYSE and the AMEX, as alleged in paragraph 14 above, and in an attempt to comply with their net capital requirements and to better its financial position, wrongfully and unlawfully converted the aforesaid Series B Debenture and issued its Registered Subordinated Debenture Series E due December 31, 1978, therefor. Said conversion was known by McDonnell & Co. to be unlawful in that, inter alia, it was made with knowledge of the fact that under the governing instrument no effective action could be taken on behalf of the trust without the consent of at least two trustees, and without the knowledge and consent of the plaintiffs. The value of said Series E Debenture at the time of the aforesaid purported exchange was substantially less than $318,622.97.

McDONNELL AMENDED COMPLAINT

59. In connection with the aforesaid conversion of the Series B Debentures, the NYSE and the AMEX in violation of the duties and obligations imposed upon them by Section 6 of the 1934 Act and otherwise, as hereinabove alleged, aided and abetted McDonnell & Co. in the unlawful conduct hereinabove alleged, in the following respects, among others:

(a) They permitted McDonnell & Co. to accomplish the aforesaid conversion of the Series B debenture even though they knew or should have known that said conversion was wrongful and unlawful as hereinabove alleged; and

(b) They approved the aforesaid conversion even though they knew or should have known that said conversion was wrongful and unlawful as hereinabove alleged and that said conversion was contrary to the interests of the trust estate and not consistent with high standards of commercial honor and integrity on the part of McDonnell & Co. as a member firm.

60. Thereafter, plaintiffs were not advised of said purported exchange until some time in the summer of 1969. Thereafter, plaintiffs demanded that McDonnell & Co. pay to plaintiffs the sum of $318,622.97. However,

McDonnell & Co. has failed or refused to do so.

61. The acts, practices and course of business hereinabove alleged operated as a fraud and deceit upon plaintiffs in the purchase and sale of securities and in connection therewith the defendants used means and instrumentalities of interstate commerce.

62. By reason of their conduct as hereinabove alleged, defendants violated Section 17 (a) of the 1933 Act and Sections 6, 10, 15, 17 and 29 of the 1934 Act.

63. As a direct result of the aforesaid wrongful and unlawful conduct, including the failure by the NYSE and the AMEX to fulfill their duties and obligations under Section 6 of the 1934 Act, as alleged hereinabove, it now appears that McDonnell & Co. does not have enough funds to make more than, at best, a minimal payment on account of debts to general creditors, and McDonnell & Co. now asserts that the holders of subordinated claims against McDonnell & Co. will receive no payment of said claims in connection with the liquidation of McDonnell & Co. The Estate of James F. McDonnell and the trust estate have therefore sustained damages in the amount of $318,622.97.

SIXTH CLAIM ON BEHALF OF
ANNA M. McDONNELL AS EXECUTRIX AND TRUSTEE
AND JAMES McDONNELL, JR. AS TRUSTEE

64. Plaintiffs reallege each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, 20, 33, 34, 36, 55, and 57 through 62 of this Amended Complaint with like effect as if here fully repeated.

65. Plaintiffs Anna M. McDonnell, as Executrix and Trustee under the Will of James F. McDonnell, and James F. McDonnell, Jr., as Trustee under the Will of James F. McDonnell, are investors within the class for whose benefit and protection the contracts between the NYSE and the SEC and between the AMEX and the SEC were executed pursuant to Section 6 (15 U.S.C. § 78 (f)) of the 1934 Act.

66. As more particularly alleged in paragraphs 5, 6, 8, 9, 11 through 14, 20, and 57 through 62 of this Amended Complaint, the NYSE and the AMEX have knowingly and wilfully failed to exercise their respective remedial and disciplinary powers or to otherwise enforce compliance, in the face of repeated violations by defendant McDonnell & Co., of the 1934 Act, the Rules and Regulations of the SEC, promulgated thereunder, and the Rules of the respective Exchanges.

67. By reason of the aforesaid conduct, the NYSE and the AMEX have each committed a direct and substantial breach of their respective contracts with the SEC, which contracts are for the benefit and protection of investors, including plaintiffs Anna McDonnell, as Executrix and Trustee, and James F. McDonnell, Jr., as Trustee.

68. By reason of the unlawful breach hereinabove alleged, the Estate of James F. McDonnell and the Trust have sustained damages in the amount of $318,622.97.

SEVENTH CLAIM ON BEHALF OF
ANNA M. McDONNELL AS EXECUTRIX AND TRUSTEE
AND JAMES McDONNELL, JR. AS TRUSTEE

69. Plaintiffs Anna M. McDonnell and James F. McDonnell, Jr. reallege each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, 20 and 55 of this Amended Complaint with like effect as if here fully repeated.

70. The Estate of James F. McDonnell and thereafter the trust created by the Will of James F. McDonnell have owned at all relevant times seven hundred ninety seven (797) shares of the $100.00 par value preferred stock of defendant McDonnell & Co.

71. As a direct result of the aforesaid wrongful and unlawful conduct, including the failure by the NYSE and the AMEX to fulfill their duties and obligations under Section 6 of the 1934 Act, as alleged

in paragraphs 13, 14 and 20, above, the preferred stock owned by the trustees is now worthless, and the trust estate has thereby been damaged in an amount in excess of $79,700.00.

EIGHTH CLAIM ON BEHALF OF
ANNA M. McDONNELL AS EXECUTRIX AND TRUSTEE
AND JAMES McDONNELL, JR. AS TRUSTEE

72. Plaintiffs reallege each and all of the allegations contained in paragraphs 1, 3 through 9, 11 through 14, 33, 34, 36, 55, 65 and 70 of this Amended Complaint with like effect as if here fully repeated.

73. As more particularly alleged in paragraphs 5, 6, 8, 9, 11 through 14, and 20 of this Amended Complaint, the NYSE and the AMEX have knowingly and wilfully failed to exercise their respective remedial and disciplinary powers or to otherwise enforce compliance, in the face of repeated violations by defendant McDonnell & Co. of the 1934 Act, the Rules and Regulations of the SEC, promulgated thereunder, and the Rules of the respective Exchanges.

74. By reason of the aforesaid conduct, the NYSE and the AMEX have each committed a direct and substantial breach of their respective contracts with the SEC, which contracts are for the benefit and protection of investors, including plaintiffs Anna M. McDonnell, as Executrix and Trustee, and James F. McDonnell, Jr. as Trustee.

McDONNELL AMENDED COMPLAINT

75. By reason of the unlawful breach hereinabove alleged, the preferred stock of defendant McDonnell & Co. owned by the trustees is now worthless and the trust estate has thereby been damaged in an amount in excess of $79,700.00.

WHEREFORE, plaintiffs demand judgment against the defendants:

(1) on the First and Second Claims hereof:

(i) for damages in the amount of $1,400,000, together with interest thereon;

(ii) for rescission of the Subordination Agreement described in paragraph 18 hereof and the Recapitalization Agreement described in paragraph 21 hereof;

(iii) for the costs and disbursements of this action; and

(iv) for such other and further relief as this Court may deem just and proper;

(2) on the Third and Fourth Claims hereof:

(i) for damages in the amount of $20,718, together with interest thereon;

(ii) for rescission of the Stock Purchase Agreement described in paragraph 43 hereof;

(iii) for attorneys' fees incurred in connection with the bringing of this action;

(iv) for the costs and disbursements

of this action; and

(v) for such other and further relief as this Court may deem just and proper;

(3) on the Fifth and Sixth Claims hereof:

(i) for damages in the amount of $318,622.92, together with interest thereon;

(ii) for rescission of the debenture "roll-over" transaction described in paragraph 58 hereof;

(iii) for the costs and disbursements of this action; and

(iv) for such other and further relief as this Court may deem just and proper;

(4) on the Seventh and Eighth Claims hereof:

(i) for damages in the amount of $79,700, together with interest thereon;

(ii) for the costs and disbursements of this action; and

(iii) for such other and further relief as this Court may deem just and proper.

DAVIS & COX

By /s/ Maxwell E. Cox
Maxwell E. Cox
A Member of the Firm
Attorneys for Plaintiffs
Office & P.O. Address
One State Street Plaza
New York, N. Y. 10004
Tel. (212) 425-0500

Dated: New York, New York
February 10, 1975.

ANSWER OF NYSE TO McDONNELL AMENDED COMPLAINT

[Doc. 164]

[CAPTION] 71 Civ. 1940 (R.O.)

Defendant New York Stock Exchange, Inc. ("the Exchange"), by its attorneys, Milbank, Tweed, Hadley & McCloy, for answer to the amended complaint:

1. Denies each and every allegation contained in paragraph 1, except admits that the claims asserted in the amended complaint are alleged to arise under the designated statutes, rules and regulations, and laws, and that the Court is alleged to have jurisdiction of the action under the designated statutes and the principle of pendent jurisdiction.

2. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies each and every allegation contained in paragraph 5, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

5. Denies each and every allegation contained

in paragraph 6, except admits that the Exchange and the AMEX at all relevant times have been national securities exchanges registered pursuant to section 6 of the Securities Exchange Act of 1934 pursuant to which each such exchange has enacted a constitution and rules and refers to said statute and the constitution and rules of each exchange for a full, accurate, and complete statement of the terms of each.

6. Denies each and every allegation contained in paragraph 8.

7. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 10.

8. Denies each and every allegation contained in paragraph 12.

9. Denies each and every allegation contained in paragraphs 13 and 14, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

10. Denies each and every allegation contained in paragraph 15, except admits that in or about January, 1969 the then chief executive officer of McDonnell & Co. committed to the Exchange that he would raise $1.6 million of capital and that subsequently certain of said executive's family, including plaintiff, Anna M.

McDonnell, entered into subordinated loan agreements with McDonnell & Co.

11. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 16 and 17.

12. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 18, except admits that in January, 1969 plaintiff did make a subordinated loan to McDonnell & Co. of certain securities.

13. Denies each and every allegation contained in paragraph 19, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

14. Denies each and every allegation contained in paragraph 20, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

15. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 21, except admits that such an agreement was evidenced by such a letter to the Exchange, and denies that said agreement was proposed by McDonnell & Co. after consultation with

the Exchange and after the Exchange had agreed upon such recapitalization to lift the restrictions which it had placed on the operations of McDonnell & Co.

16. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 22.

17. Denies each and every allegation contained in paragraph 23, except denies knowledge or information sufficient to form a belief as to the allegations as they may relate to the AMEX.

18. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 24.

19. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 25, except denies that the Exchange knew or should have known of the alleged conversion and issuance of the alleged subordinated installment note.

20. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 26, except admits that on or about March 24, 1970, the Exchange entered into an agreement with McDonnell & Co., its directors

and certain of its voting stockholders, which provided, among other things, for the appointment of a liquidator to be appointed by the Exchange, and that such liquidator was thereafter appointed by the Exchange.

21. Denies each and every allegation contained in paragraphs 27 and 28, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

22. Denies each and every allegation contained in paragraphs 29, 30, and 31, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX and to McDonnell & Co.

23. Denies each and every allegation contained in paragraphs 34, 35, 36, 37, 38 and 39, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

24. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 40, 41 and 42.

25. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 43, except admits

that in May, 1969 James F. McDonnell, Jr. did purchase some 300 shares of common stock of McDonnell & Co.

26. Denies each and every allegation contained in paragraph 44, except admits that the Exchange's rules provide for Exchange review of sales of common stock in member organizations, refers to said rules for a full, accurate, and complete statement of their terms, and denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

27. Denies each and every allegation contained in paragraph 45, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

28. Denies each and every allegation contained in paragraphs 46, 47, and 48, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX and McDonnell & Co.

29. Denies each and every allegation contained in paragraphs 50, 51, 52, 53, 54, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to AMEX.

ANSWER OF NYSE TO McDONNELL AMENDED COMPLAINT

30. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 55, 57, and 58.

31. Denies each and every allegation contained in paragraph 59, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

32. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 60.

33. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 61, except denies such allegations as they may relate to the Exchange.

34. Denies each and every allegation contained in paragraph 62, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX and to McDonnell & Co.

35. Denies each and every allegation contained in paragraph 63, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX and McDonnell & Co. and as to whether the said Estate and Trust have

been damaged, and if so, in what amount.

36. Denies each and every allegation contained in paragraphs 65, 66, 67, 68, 71, 73, 74 and 75, except denies knowledge or information sufficient to form a belief as to the truth of the allegations as they may relate to the AMEX.

FOR A FIRST DEFENSE

37. Plaintiffs lack standing to assert the claims pleaded in the amended complaint against the Exchange.

WHEREFORE, defendant New York Stock Exchange, Inc. demands judgment dismissing the amended complaint, with costs and disbursements.

Dated: New York, New York
February 20, 1975

MILBANK, TWEED, HADLEY & McCLOY

By /s/ Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant
New York Stock Exchange, Inc.

ANSWER OF McDONNELL & CO. TO
McDONNELL AMENDED COMPLAINT

[Doc. 204]

[CAPTION] 71 Civ. 1940 RO

Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated ("McDonnell"), answering the amended complaint herein on behalf of said defendant:

1. Denies the allegations contained in paragraph 1 of the amended complaint, except admits that this action is alleged to be brought pursuant to and that this Court's jurisdiction is alleged under the statutes, laws, sections and rules referred to therein.

FIRST CLAIM

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3, 4, 5 and 6 of the amended complaint.

3. Denies the allegations contained in paragraph 8 of the amended complaint.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the amended

complaint, except admits that plaintiff, Anna M. McDonnell, as of June, 1965, entered into a written agreement with McDonnell and respectfully refers the Court to the terms, provisions and contents thereof.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the amended complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12, 13, 14 and 15 of the amended complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16, 17, 18, 21, 24 and 25 of the amended complaint except admits, upon information and belief, that in January, 1969, plaintiff, Anna M. McDonnell, entered into a certain agreement relating to said plaintiff's account maintained with McDonnell and respectfully refers the Court to the terms, provisions and contents thereof; that during October, 1969, 50% in value of the securities in said plaintiff's subordinated account were exchanged for McDonnell preferred stock with the express consent

and approval of plaintiff; and that thereafter, again with said plaintiff's express knowledge, consent, approval and agreement, the remaining securities in her subordinated account were exchanged for a five-year subordinated installment obligation of McDonnell.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 19, 20, 22, 23, 26, 27, 28, 29, 30 and 31 of the amended complaint.

SECOND CLAIM

9. In response to paragraph 32 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1 through 31 of the amended complaint as if fully stated herein.

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 33, 34, 35, 36, 37, 38 and 39 of the amended complaint.

THIRD CLAIM

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40 of the amended complaint, and repeats and realleges the responses set

forth above to paragraphs 1, 3 through 9, 11 through 14, and 20 of the amended complaint as if fully set forth herein.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41 and 42 of the amended complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 43 of the amended complaint, except admits, upon information and belief, that plaintiff James F. McDonnell, Jr. purchased 300 shares of McDonnell's common stock at an adjusted purchase price of $69.06 per share, representing the book value of such stock as determined by independent certified public accountants.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 44, 45, 46, 47 and 48 of the amended complaint.

FOURTH CLAIM

15. In response to paragraph 49 of the amended complaint, repeats and realleges the responses

set forth above to paragraphs 1, 3 through 9, 11 through 14, 20, 33, 34, 36 and 40 through 48 of the amended complaint as if fully stated herein.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 50, 51, 52, 53 and 54 of the amended complaint.

FIFTH CLAIM

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 55 of the amended complaint.

18. In response to paragraph 56 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1, 3 through 9, 11 through 14, and 20 of the amended complaint as if fully stated herein.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the amended complaint except admits, upon information and belief, that prior to 1967, the Estate of James F. McDonnell was the owner of a certain subordinated debenture of McDonnell.

ANSWER OF McDONNELL & CO. TO
McDONNELL AMENDED COMPLAINT

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 58, 59, 60, 61 and 62 of the amended complaint.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 63 of the amended complaint, except admits that it now appears that McDonnell does not have enough funds to meet the claims of its subordinated creditors.

SIXTH CLAIM

22. In response to paragraph 64 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1, 3 through 9, 11 through 14, 20, 33, 34, 36, 55 and 57 through 62 of the amended complaint as if fully stated herein.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 65, 66, 67 and 68 of the amended complaint.

SEVENTH CLAIM

24. In response to paragraph 69 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1, 3 through 9, 11

through 14, 20 and 55 of the amended complaint as if fully stated herein.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 70 of the amended complaint, except admits and alleges that heretofore the Estate of James F. McDonnell was the owner of a certain number of shares of McDonnell preferred stock.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 71 of the amended complaint.

EIGHTH CLAIM

27. In response to paragraph 72 of the amended complaint, repeats and realleges the responses set forth above to paragraphs 1, 3 through 9, 11 through 14, 33, 34, 36, 55, 65 and 70 of the amended complaint as if fully stated herein.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 73, 74 and 75 of the amended complaint.

ANSWER OF McDONNELL & CO. TO
McDONNELL AMENDED COMPLAINT

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

29. The allegations of the amended complaint fail to state a claim upon which relief may be granted against McDonnell.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

30. Upon information and belief, plaintiffs Anna M. McDonnell and James F. McDonnell, Jr., are the mother and brother, respectively, of T. Murray McDonnell who was at all times mentioned in the amended complaint the Chief Executive Officer of McDonnell, and plaintiffs had full knowledge of the financial, operational and business conditions of McDonnell throughout said period.

31. By reason of the above, plaintiffs have waived and are estopped from asserting any of the alleged rights and claims sued upon in their amended complaint.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

32. Each and every allegation contained in the above paragraph 30 is repeated and realleged with the same force and effect as though fully stated herein.

ANSWER OF McDONNELL & CO. TO
McDONNELL AMENDED COMPLAINT

33. Upon information and belief, plaintiffs had full knowledge of, and consented to, any and all transactions and occurrences recited in their amended complaint and thereby have waived and are barred and estopped from asserting any and all rights or claims with respect thereto.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

34. Each and every allegation contained in the above paragraphs 30 and 33 is repeated and realleged with the same force and effect as though fully stated herein.

35. Upon information and belief, with full knowledge of all the facts as set forth in the complaint or amended complaint, plaintiffs refrained from commencing this action until the 5th day of May, 1971, and have thereby been guilty of such laches as should in equity bar them from maintaining this action.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

36. Plaintiffs' complaint and amended complaint are barred by the applicable statute of limitations.

ANSWER OF McDONNELL & CO. TO
McDONNELL AMENDED COMPLAINT

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE AS
TO THE FIRST CLAIM ALLEGED IN THE COMPLAINT

37. Upon information and belief, any and all transactions and occurrences relating to plaintiff's account maintained with McDonnell as alleged in the FIRST CLAIM of the amended complaint occurred with the full knowledge and express agreement of plaintiff, Anna M. McDonnell, and were in full and complete compliance with the terms and conditions of the agreements between said parties.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE AS
TO THE FIFTH CLAIM ALLEGED IN THE COMPLAINT

38. Upon information and belief, with respect to each and every transaction and occurrence alleged in paragraphs 57 and 63 of the amended complaint, McDonnell acted solely and exclusively through and by its then Chief Executive Officer, T. Murray McDonnell, and no other officer, director, employee or stockholder of McDonnell had knowledge of, or participated in said alleged transactions and occurrences.

39. Upon information and belief, at all times relevant to the transactions and occurrences alleged in the FIFTH CLAIM of the complaint, the said T. Murray McDonnell was one of the three trustees

appointed under the Will of James F. McDonnell to administer a residuary trust created by that Will, which Will is referred to in the FIFTH CLAIM of the amended complaint.

40. Upon information and belief, at all times relevant to the transactions and occurrences alleged in the FIFTH CLAIM of the complaint, T. Murray McDonnell was acting in a capacity adverse and opposed to the interests of McDonnell, namely in his capacity as trustee under the said Will of James F. McDonnell, and he therefore ceased to be an agent acting in good faith for the interests of McDonnell. McDonnell is not bound by the acts of said agent nor may said agent's knowledge of the unlawful nature of his alleged acts be imputed to McDonnell.

41. By reason of the above, defendant McDonnell is not liable to plaintiffs for any wrongful act performed by the said T. Murray McDonnell as alleged in the FIFTH CLAIM of the amended complaint.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE TO
THE FIFTH CLAIM ALLEGED IN THE COMPLAINT

42. Each and every allegation contained in the above paragraphs 38 through 40 is repeated and

realleged with the same force and effect as though stated fully herein.

43. Upon information and belief, pursuant to the provisions of the New York Uniform Commercial Code and the New York General Business Law, McDonnell was under no duty to inquire as to the powers of the plaintiffs or T. Murray McDonnell in their capacities as co-trustees under the Will of James F. McDonnell with respect to the transactions and occurrences alleged in the FIFTH CLAIM of the amended complaint.

44. By reason of the above, defendant McDonnell is not liable to plaintiffs for any wrongful acts performed by T. Murray McDonnell as alleged in the FIFTH CLAIM of the amended complaint.

WHEREFORE, Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated demands judgment

dismissing the amended complaint as to it, together with the costs and disbursements of this action.

Dated: March 3, 1975

PROSKAUER ROSE GOETZ & MENDELSOHN

By s/ George G. Gallantz
George G. Gallantz
A Member of the Firm
Attorneys for Bruce M. Stargatt, as Receiver for defendant McDonnell & Co., Incorporated
300 Park Avenue
New York, N.Y. 10022
(212-593-9000)

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ANSWER OF AMEX TO McDONNELL AMENDED COMPLAINT

[Doc. 205]

[CAPTION] 71 Civ. 1940 RO

Defendant American Stock Exchange, Inc. (the "Amex") by its attorneys, Lord, Day & Lord, answering the amended complaint:

1. Admits that the claims asserted in the amended complaint are alleged to arise under the designated statutes, rules and regulations and laws, and that the Court is alleged to have jurisdiction of the action under the designated statutes and the principle of pendent jurisdiction, but except as so expressly admitted, denies each and every allegation contained in paragraph 1 of the amended complaint.

2. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 2 of the amended complaint.

3. Admits the allegations contained in paragraph 4 of the amended complaint, except that on May 13, 1971 the Amex became, and still is, a not-for-profit corporation organized under the laws of the State of New York.

ANSWER OF AMEX TO McDONNELL AMENDED COMPLAINT

4. Denies each and every allegation contained in paragraph 5 of the amended complaint as it pertains to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the New York Stock Exchange (the "N.Y.S.E.").

5. Denies each and every allegation contained in paragraph 6 of the amended complaint, except admits that the Amex and the N.Y.S.E. at all relevant times have been national securities exchanges registered pursuant to section 6 of the Securities Exchange Act of 1934 pursuant to which each such exchange has enacted a constitution and rules and refers to said statute and the constitution and rules of each exchange for a full, accurate, and complete statement of the terms of each.

6. Denies each and every allegation contained in paragraph 8 of the amended complaint.

7. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 10 of the amended complaint.

8. Denies that it has knowledge or information sufficient to form a belief as to the truth of

each and every allegation contained in paragraphs 11 and 12 of the amended complaint.

9. Denies each and every allegation contained in paragraphs 13 and 14 of the amended complaint as they pertain to the Amex, and denies that the Amex was under any duty to supervise the financial condition or operations of McDonnell & Co. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 13 and 14 of the amended complaint as they pertain to the N.Y.S.E.

10. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 15, 16, 17 and 18 of the amended complaint.

11. Denies each and every allegation contained in paragraph 19 of the amended complaint as it pertains to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the N.Y.S.E.

12. Denies each and every allegation contained in paragraph 20 of the amended complaint as it pertains to the Amex, except denies that it has

knowledge or information sufficient to form a belief concerning the alleged deterioration of the business and affairs of McDonnell & Co. after January, 1969. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 20 as it pertains to the N.Y.S.E.

13. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 21 and 22 of the amended complaint.

14. Denies each and every allegation contained in paragraph 23 of the amended complaint as it pertains to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the N.Y.S.E.

15. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 24 of the amended complaint.

16. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 25

of the amended complaint, except denies that the Amex knew or should have known of the alleged conversion and issuance of the alleged subordinated installment note.

17. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 26 of the amended complaint, except admits that in or about March, 1970, a liquidator named by the N.Y.S.E. was appointed for McDonnell & Co.

18. Denies each and every allegation contained in paragraphs 27 and 28 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E.

19. Denies each and every allegation contained in paragraphs 29, 30 and 31 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E. and McDonnell & Co., Inc.

20. Denies each and every allegation contained in paragraphs 34, 35, 36, 37, 38 and 39 of

the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E.

21. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 40, 41, 42 and 43 of the amended complaint.

22. Denies each and every allegation contained in paragraph 44 of the amended complaint as it pertains to the Amex, denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the N.Y.S.E., and refers to the constitution and rules of the Amex and the N.Y.S.E. and the Securities Exchange Act of 1934 for a complete and accurate statement of the provisions thereof.

23. Denies each and every allegation contained in paragraph 45 of the amended complaint as it pertains to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the N.Y.S.E.

ANSWER OF AMEX TO McDONNELL AMENDED COMPLAINT

24. Denies each and every allegation contained in paragraphs 46, 47 and 48 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E. and McDonnell & Co.

25. Denies each and every allegation contained in paragraphs 50, 51, 52, 53 and 54 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E.

26. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 55, 57 and 58 of the amended complaint.

27. Denies each and every allegation contained in paragraph 59 of the amended complaint as it pertains to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as it pertains to the N.Y.S.E.

28. Denies that it has knowledge or information sufficient to form a belief as to the truth of

each and every allegation contained in paragraph 60 of the amended complaint.

29. Denies each and every allegation contained in paragraphs 61, 62 and 63 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E. and McDonnell & Co.

30. Denies each and every allegation contained in paragraphs 65, 66, 67 and 68 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E.

31. Denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 70 of the amended complaint.

32. Denies each and every allegation contained in paragraphs 71, 73, 74 and 75 of the amended complaint as they pertain to the Amex, and denies that it has knowledge or information sufficient to form a belief as to the truth of each and every allegation therein as they pertain to the N.Y.S.E.

ANSWER OF AMEX TO McDONNELL AMENDED COMPLAINT

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

33. This Court lacks jurisdiction of the subject matter of this action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

34. The amended complaint fails to state a claim upon which relief can be granted against the Amex.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

35. At all times mentioned in the complaint, McDonnell & Co. was a member of, and subject to the jurisdiction of, the N.Y.S.E., which has rules relating to the financial condition and operations of its member organizations and the reporting thereof to that exchange, and that exchange supervises and examines its member organizations with a view to compliance with such rules.

36. It is understood by the member organizations which have memberships both in the N.Y.S.E. and in the Amex, and by the Securities and Exchange Commission and the Congress of the United States, that in the case of such organizations having membership on both said exchanges, such supervision and examination are to be conducted by the N.Y.S.E. and not by the Amex.

ANSWER OF AMEX TO McDONNELL AMENDED COMPLAINT

37. The rules of the Amex relating to the reporting to the Amex of the financial condition and operations of its member organizations expressly provide that such rules do not apply to member organizations of the Amex which are subject to the jurisdiction of another exchange, and said rules of the Amex have been filed with and approved by the Securities and Exchange Commission under the provisions of the Securities Exchange Act of 1934, as amended.

38. By reason of the foregoing, the Amex was under no duty to supervise the financial condition and operations of McDonnell & Co. or to examine its books and records.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

39. Upon information and belief, the plaintiffs occupied special family, financial and other relationships with McDonnell & Co. as investors for their own accounts and as fiduciaries for estates and trusts which held substantial interest in the firm. Additionally, plaintiff James F. McDonnell, Jr. was an officer of said firm.

40. Upon information and belief, plaintiffs' special relationships with McDonnell & Co. as aforesaid afforded them the means for acquiring complete and

accurate information concerning the financial affairs and operations of McDonnell & Co. prior to advancing funds to the firm for the purchase of stock or for subordinated loans. Plaintiffs therefore knew, or in the exercise of reasonable diligence should have known, at the time they made investments in, or extended credit to, McDonnell & Co., of the alleged financial and operating problems of the firm.

41. By reason of the foregoing, the alleged financial commitments made by plaintiffs to McDonnell & Co. prior and subsequent to January 1, 1969, were not induced by any representations or holding out to the plaintiffs by the Amex, nor in reliance upon the Amex's surveillance of McDonnell & Co. or the firm's status as an Amex member organization; and all risk of loss as the result of the financial commitments and investments made by plaintiffs in McDonnell & Co. was assumed voluntarily by plaintiffs with knowledge of the facts, and they are estopped and barred from asserting any of the claims alleged in the complaint.

WHEREFORE, defendant American Stock Exchange, Inc. prays for judgment dismissing the amended

complaint, together with the costs and disbursements of this action.

Dated: New York, New York
March 4, 1975

LORD, DAY & LORD

By s/ John J. Loflin
(A Member of the Firm)
Attorneys for defendant American Stock Exchange, Inc.
25 Broadway
New York, New York 10004
(212) 344-8480

PLAINTIFFS' REQUEST TO CHARGE
[Doc. 187]

[CAPTION]

71 Civ. 461 R.O.
71 Civ. 1940 R.O.

PLAINTIFFS' REQUEST TO CHARGE

Plaintiffs respectfully request that the Court include the following instructions in its charge to the jury:

A-110

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 1

INTRODUCTORY INSTRUCTION

Members of the jury, you are about to enter upon your final duty, which is to decide the fact issues in the case.

As I told you in my instructions at the beginning of the trial your principal function during the taking of testimony would be to listen carefully and observe each witness as he testified, and it has been evident, as counsel themselves have noted, that you have faithfully discharged this duty.

The trial of this case has been somewhat protracted due to the number of witnesses who testified and the number of documents received in evidence and read to the jury. This was unavoidably time-consuming and at times even tedious but, nonetheless, your interest never flagged, and it is evident that you followed the testimony with close attention.

We have now reached the point of the case where all the evidence has been presented and the closing arguments of the lawyers have been made. Shortly, after I have completed my explanation of the applicable law, you will retire to deliberate upon your verdict.

You are to perform your final duty in an attitude of complete fairness and impartiality. You are to appraise

PLAINTIFFS' REQUEST TO CHARGE

the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the plaintiffs or the defendants as parties to this controversy.

Now, as I told you in my instructions at the commencement of this case, the fact that plaintiffs are individuals while defendants are corporations should in no way affect your verdict. All persons stand as equals before the law and are to be dealt with as equals in the court of justice.

Your final role is to pass upon and decide the fact issues in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences that are to be drawn from the facts as you have determined them.

My function at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them. The logical result of that application is the verdict in the case.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that

counsel either for the plaintiffs or for the defendants may have said with respect to any matters in evidence, that is, as to any factual matter, whether stated in a question, in argument or in summation, is not to be substituted for your own independent recollection.

So too, anything the Court may have said during the progress of the trial with respect to a fact matter or may say during the course of these instructions, is not to be taken in substitution for your own independent recollection; that governs at all times.

In determining the facts, you should not be influenced by rulings that the Court may have made during the trial. These rulings dealt with matters of law and not questions of fact. Counsel for both sides have not only the right but, indeed, the duty to press whatever legal objections they believe exist as to the admission of offered evidence. The Court's rulings on objections made either by the attorneys for the plaintiffs or the attorneys for the defendants, are not to be considered by you. Of course, as I told you at the outset, where I have sustained an objection to a question you must not speculate on what the witness would have said

had he been permitted to answer. Nor may you draw any inference from the wording of the question or that it was asked. Similarly, where any testimony has been stricken, it is not evidence and you are bound to disregard it. However, you must remember that in ruling on objections the court is deciding questions of law and not questions of fact. Those are for the jury alone.

A cautionary note:

During the course of the trial, there were occasions when I admonished either plaintiffs' or defense lawyers. Sometimes in the ardor of advocacy, counsel say or do things which in calmer moments they would not have said or done. Any such incidents must play no part in your deliberations. The personalities of the lawyers or the Judge have nothing to do with the case.

I recognize that any judge can have a great deal of influence upon a jury. I want you to understand that I have no opinion with respect to the merits on either side of the controversy before you.

If you do think that you gleaned some indication as to my opinion of this case, either from any questions I may have asked or from my expression or tone of voice, disregard it entirely. The Court has no opinion as to the veracity or the credibility of the witnesses or the merits

of the case. You are the judges of the facts and you alone are charged with the duty of resolving the disputed issues of fact and deciding the merits of this litigation. I am merely a judge of the law. The fact issues must be decided by you solely and only within the framework of the evidence and principles of law that apply.

Finally, please don't single out any one instruction of mine as stating the law alone. Take them all into account after you have heard them all.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 2

MULTIPLE PARTIES

Although there are four plaintiffs in this action, it does not follow from that fact alone that if one is entitled to recover, all are entitled to recover. Similarly, although there are three defendants in this action, it does not follow from that fact alone that if one is found liable, or not liable, all are liable or not liable. Each plaintiff is entitled to a fair consideration of his claim against each defendant. Similarly, each defendant is entitled to a fair consideration of his defense as to each plaintiff. Unless otherwise stated, all instructions given to you govern the case as to each plaintiff and as to each defendant.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 3

EVIDENCE - GENERAL

Now, members of the jury, you are to consider only the evidence in this case and that evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the deposition testimony read here before you, any facts which may have been stipulated between counsel and any presumptions which I may tell you about during the course of these instructions.

But while you are to consider only the evidence in this case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved such reasonable inferences as seem justified to you in the light of your own experience.

An inference is a fancy word for a conclusion which reason or common sense leads you to draw from the facts that have been proved.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 4

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Generally speaking, there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eye witness, somebody who saw or heard something done or said.

The other is indirect or circumstantial evidence which is the proof of a chain or circumstances pointing to the existence or non-existence of certain facts. Generally, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial.

There is a simple example that is frequently used to illustrate what is meant by circumstantial evidence.

Assume that when you came to court this morning the sun was shining brightly, the sky was clear and it wasn't raining. In addition, assume that we were in one of our modern air-conditioned courtrooms with no windows. Assume further that after we had been in court for about an hour or so someone walked in carrying an umbrella which was dripping water; shortly thereafter a second man came in wearing a raincoat and that raincoat was wet.

PLAINTIFFS' REQUEST TO CHARGE

Now even though you could not look out and directly observe the weather, and even though it wasn't raining when you entered the courthouse, you could reasonably and logically conclude from the combination of facts I have described that it was raining. That is circumstantial evidence, a chain of circumstances which leads you to conclude that a fact exists or doesn't exist.

As I told you, generally the law makes no distinction between direct evidence and circumstantial evidence, it only requires that you find the facts in accordance with all the evidence in the case.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 5

PREPONDERANCE OF THE EVIDENCE

In a civil action such as this, the burden is on the plaintiff to prove every essential element of his or her claim by a fair preponderance of the credible evidence.

To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you should consider the testimony of all the witnesses and all exhibits received in evidence.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 6

SECTION 10(b), RULE 10b-5 - THE STATUTE

The complaints allege that the subordination agreement between Mrs. Murphy and McDonnell & Co.; the subordination agreement between Mrs. Anna McDonnell and McDonnell & Co., the James McDonnell, Jr. purchase of McDonnell & Co. common stock; and the "roll-over" of the Series B subordinated debenture owned by the Trust created under the Will of James McDonnell, were each procured by fraudulent acts in violation of Section 10(b) of the Federal Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

Section 10(b) provides in pertinent part that:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Among the rules adopted by the Securities and Exchange Commission pursuant to the authority granted it by this section is Rule 10b-5. Rule 10b-5 provides that:

PLAINTIFFS' REQUEST TO CHARGE

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 7

RULE 10b-5 - ELEMENTS

In order to find a defendant liable for a violation of Rule 10b-5 in connection with any of the first three transactions involved in this case, that is, the subordination agreement by Mrs. Murphy, the subordination agreement by Mrs. McDonnell, and the stock purchase by Mr. McDonnell, you must be satisfied that, as to the particular transaction, the plaintiffs have established each of the following essential elements by a fair preponderance of the credible evidence:

First: That the particular transaction you are considering involved a purchase or sale of a security.

In this connection, I instruct you that stocks and subordination agreements are securities for the purposes of Rule 10b-5. Thus, if you find that a particular plaintiff entered into a subordination agreement or purchased stock, then that plaintiff has purchased a security and the first element is satisfied;

Second: That in connection with such sale of securities the defendant knowingly made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statement

made in the light of the circumstances under which they were made not misleading;

Third: That in connection with the transaction the defendant, directly or indirectly, used any instrumentality of interstate commerce or the mails;

Fourth: That the particular plaintiff you are considering purchased the security in reliance upon the untrue statement or omission; and

Fifth: That the transaction resulted in injury to the plaintiff.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 8

RULE 10b-5 - SECOND ELEMENT

Now, in connection with the various essential elements I have just listed, I believe you may find some further explanation helpful to you. With respect to the second element, that is, that the defendant knowingly made an untrue statement of material fact, or omitted to state a necessary material fact, I charge you that a statement is made knowingly if it is known to be false when made or if it is made recklessly and without regard to its truth or falsity.

An omission or untrue statement is material if it concerns a fact which a reasonable investor might have considered important in making a decision to purchase or not to purchase a particular security.

[Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 10

RULE 10b-5 - FOURTH ELEMENT

If you find that the plaintiff has established the first three elements by a fair preponderance of the credible evidence, you must then consider the fourth element, that is, whether a plaintiff relied upon the untrue statement or omission in deciding whether or not to purchase the security. In this connection, I instruct you that if you have found that a fraud was committed, in whole or in part, by the use of omissions of material fact, then you may infer that the plaintiff relied upon such omissions. Stated another way, in the case of a fraudulent sale of securities involving omissions of material fact a plaintiff need not establish independent proof of reliance. Proof of the materiality of the omission is all that is required.

[Affiliated Ute Citizens v. United States, 406 U.S. 128, 153, 154 (1972); Titan Group, Inc. v. Faggen [Current] CCH Fed. Sec. L. Rep. ¶ 95,042 at 97,646.]

PLAINTIFFS' REQUEST TO CHARGE

If, however, you should find that the fraud was accomplished, in whole or in part, by the making of untrue statements of material fact, you must then consider whether the particular plaintiff relied upon such untrue statements in deciding to purchase the security.

In this connection, I charge you that the test of reliance is whether the misrepresentation was a substantial factor in determining the course of conduct which resulted in the plaintiffs' investment.

[List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965).]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 11

RULE 10b-5 - FIFTH ELEMENT

Once you are satisfied that a particular transaction was procured as the result of a violation of Rule 10b-5 as I have explained it to you, you must then consider whether the particular plaintiff has sustained damages as a result of that transaction. With regard to the proper measure of damages, I shall give you more detailed instructions at a later point.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 12

RULE 10b-5 - THE DEBENTURE ROLLOVER

In order to find a defendant liable for a violation of Rule 10b-5 in connection with the rollover of the Series B subordinated debenture owned by the Trust created under the Will of James F. McDonnell, you must be satisfied that the plaintiffs have established each of the following essential elements by a fair preponderance of the credible evidence:

First, as in the case of the previous transactions, that the rollover involved a purchase or sale of the security. In this connection I instruct you that a debenture is a security for the purposes of Rule 10b-5. Thus, if you find that the Series B debenture was "rolled over", then the first element is satisfied;

Second, that in connection with the rollover a defendant engaged in an act, practice or course of business which operated as a fraud; and

Third, that the fraud resulted in the injury to the plaintiff.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 13

RULE 10b-5 - THE DEBENTURE ROLLOVER

("Second Element")

The first and third essential elements of a Rule 10b-5 violation in connection with the debenture rollover have been sufficiently defined in my discussion of the other transactions. The Second Element, however, may require some further explanation.

If you find that the Series B debenture was exchanged for a Series E debenture without proper authority, that is without the authority of at least two of the three Trustees, then the substitution constituted an act, practice or course of business which operated as a fraud.

[See, e.g., Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 14

SECTION 20(a) - CONTROLLING PERSON

In addition to contending that the American Stock Exchange and the New York Stock Exchange are liable for a direct violation of Rule 10b-5, plaintiffs contend that the Exchanges are liable for any 10b-5 violation committed by McDonnell & Co. under a theory known as "controlling persons". This contention is made under the provisions of Section 20 of the Federal Securities Exchange Act of 1934.

Section 20 provides, in pertinent part, as follows:

> "Every person who directly or indirectly controls any person liable under any provision of this title or any rule or regulation thereunder, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

As a matter of law, a Stock Exchange is a controlling person of each of its member firms. Thus, if you find that McDonnell & Co. violated Rule 10b-5, the American Stock Exchange and the New York Stock Exchange are liable for that violation as controlling persons, unless they acted in good faith and did not directly or indirectly induce the act, or acts, constituting the violation by McDonnell & Co.

PLAINTIFFS' REQUEST TO CHARGE

Under the controlling person theory of liability, the plaintiff has no burden of showing that the Exchange acted in bad faith or that the Exchange directly or indirectly induced the acts constituting the violation. Under this theory all the plaintiff need show is that McDonnell & Co. violated Rule 10b-5. Under the controlling person theory the defendant bears the burden of establishing that he acted in good faith and did not directly or indirectly induce the act constituting the violation.

In this regard I charge you that in order to establish good faith an Exchange must show by a fair preponderance of the evidence that adequate precautionary measures were taken to prevent the violation. Thus, in deciding whether or not an Exchange acted in good faith with respect to a particular transaction, you may consider any evidence concerning the action, if any, taken by an Exchange to prevent the fraudulent transaction. If you are satisfied that the Exchange acted in good faith, in all respects, you must then consider whether or not the Exchange directly or indirectly induced the act or acts constituting the violation. A person may be said to have induced an act if by his conduct he set into operation a course of events that brought about the commission of the act.

If you find by a fair preponderance of the credible evidence that an Exchange has both acted in good faith, in all respects, and did not directly or indirectly induce the act

PLAINTIFFS' REQUEST TO CHARGE

constituting the violation, then that Exchange cannot be liable under the controlling person theory.

[See Plaintiffs' Trial Memorandum, at pp. 38-42.]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 15

AIDING AND ABETTING

With respect to the Rule 10b-5 claims made against the New York Stock Exchange and the American Stock Exchange, the plaintiffs, in addition to relying on direct liability and on the controlling person provisions I have just described, also rely upon a theory of law known as "aiding and abetting."

Under this theory where one person commits a violation of Rule 10b-5 and a second person aids and abets in the commission of that violation, that second person is jointly and severally liable for the damages resulting from the violation.

Thus, if you find that McDonnell & Co. violated Rule 10b-5 with respect to a particular transaction, you must then determine whether either the New York Stock Exchange or the American Stock Exchange aided and abetted the commission of that violation. In order to find an Exchange liable as an aider and abettor to a violation of Rule 10b-5 with respect to a particular transaction, you must be satisfied that the plaintiffs have established each of the following essential elements by a fair preponderance of the credible evidence:

First, that the defendant Stock Exchange had knowledge of, or, but for a breach of a duty

of inquiry should have had knowledge of, the acts constituting a violation of Rule 10b-5; and

Second, that, possessing such knowledge, the Exchange failed to act due to a breach of a duty of disclosure.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 16

AIDING AND ABETTING - ELEMENTS DEFINED

In connection with these elements some further explanation would be helpful.

With respect to the first element, that is that the Exchange had knowledge, or, but for a breach of a duty of inquiry, should have had knowledge of the fraud, I charge you that, under the provisions of Section 6, an Exchange has a duty to regulate and supervise its member firms. Thus, in considering this first element, you may consider any evidence that the Exchange had knowledge of a fraudulent transaction. You may also consider any evidence concerning the care or lack of care taken by the Exchange in discharging its regulatory function with regard to McDonnell & Co. Thus, if you find that an Exchange did not exercise reasonable care in regulating McDonnell & Co. and would have discovered the underlying fraud if such reasonable care had been exercised, then this first element is satisfied.

With respect to the second element, I charge you that as a matter of law an Exchange is charged with the obligation to comply with the provisions of the Securities Exchange Act, and that those provisions include a requirement for full disclosure. Thus, if you find that an Exchange in

the exercise of reasonable care should have had knowledge of a violation of Rule 10b-5, then the Exchange's failure to discover such violation satisfies the requirement of a breach of a duty of disclosure, and the second element of aiding and abetting is fulfilled.

[Hochfelder v. Midwest Stock Exchange, 379 F.Supp. 1122 (N.D. Ill. 1972), aff'd, 503 F.2d 364 (7th Cir.), cert. denied, 43 U.S.L.W. 3202 (U.S. Oct. 15, 1974), Hochfelder v. Ernst & Ernst, [Current] CCH Fed. Sec. L. Rep. ¶ 94,781 (7th Cir. 1974), cert. granted, 43 U.S.L.W. 3545 (U.S. Apr. 5, 1975); SEC v. Spectrum Ltd., 489 F.2d 535 (2d Cir. 1973).]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 17

SECTION 6 - THE STATUTE

The complaints allege that both the New York Stock Exchange and the American Stock Exchange violated the provisions of Section 6 of the Securities Exchange Act in discharging their regulatory functions with regard to McDonnell & Co., Inc. Section 6 provides, in pertinent part, for the registration of a national securities exchange with the Securities and Exchange Commission. The statute requires that as a condition of registration a national securities exchange shall file with the Securities and Exchange Commission:

> ". . . an agreement . . . to comply and to enforce so far as within its powers compliance by its members with the provisions of [the Securities Exchange Act] and any amendments thereto and any rules or regulations made or to be made thereunder."

In addition to being registered under this Section, an exchange must adopt rules:

> ". . . providing for expulsion, suspension or disciplining of a member for conduct or proceedings inconsistent with just and equitable principles of trade."

The statute continues to require that the rules of an exchange must declare that a wilful violation of any of the provisions of the Securities Exchange Act or any rules or regulations thereunder shall be considered conduct or proceedings inconsistent with just and equitable principles of trade.

PLAINTIFFS' REQUEST TO CHARGE

The plaintiffs allege that the New York Stock Exchange and the American Stock Exchange, both of which are registered as national securities exchanges pursuant to Section 6, failed to properly discharge their regulatory functions with regard to McDonnell & Co. in two ways. First, that the defendant Exchanges failed to take appropriate measures to correct violations of the net capital rules by McDonnell & Co.; and second, that the Exchanges failed to take appropriate action to correct certain record keeping violations by McDonnell & Co.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 18

SECTION 6 - ESSENTIAL ELEMENTS

Three essential elements are required to be proved in order to establish liability for a violation of Section 6, such as that claimed by the plaintiffs. In order to find either the American Stock Exchange or the New York Stock Exchange liable for a violation of Section 6, you must be satisfied that the plaintiffs have established each of these essential elements by a fair preponderance of the evidence.

The essential elements are:

First: That the Exchange knew or had reason to believe or suspect that McDonnell & Co. was operating in violation of the rules of the Exchange; and

Second: That the Exchange thereafter failed to take appropriate action to correct such violation.

If you find that these first two elements are established, then proof of a Section 6 violation is complete. You must next determine the third essential element, which is that the Section 6 violation resulted in injury to the plaintiffs.

[Adopted from the decision in Marbury Management v. Alfred Kohn, Wood, Walker & Co., 373 F.Supp. 140, 143 (S.D.N.Y. 1974).]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 19

SECTION 6 - FIRST ELEMENT DEFINED

Plaintiffs allege that beginning in 1968 and continuing until the close of McDonnell & Co. in 1970, McDonnell & Co. was operating in violation of certain rules of both the New York Stock Exchange and the American Stock Exchange.

Now, in considering whether the plaintiffs have established the essential elements of a Section 6 claim, you must first consider whether the evidence in the case shows that the Exchange knew, or had reason to believe or suspect, that McDonnell & Co. was operating in violation of the rules of that Exchange.

In determining whether this first element has been established, you may consider any evidence that an Exchange had knowledge of a violation. In addition, you may consider whether an Exchange had the means of acquiring such knowledge, for, in the law, the means of knowledge are ordinarily the equivalent of knowledge. So, if it appears from the evidence in the case that an Exchange had information which would lead a reasonably prudent person to make inquiry through which he would learn about a violation, then the Exchange may be found to have had knowledge of the violation, the same as if it had made such inquiry and had actually learned about the violation.

PLAINTIFFS' REQUEST TO CHARGE

That is to say, under the law an Exchange has notice and knowledge of whatever it would have learned upon making such inquiry as it would have been reasonable to expect an Exchange to make under the circumstances.

Knowledge or notice may also be established by circumstantial evidence. If it appears that a certain violation had existed for a substantial period of time and that the Exchange had regular opportunities to observe the condition amounting to the violation, then you may infer that the Exchange knew or should have known of the violation.

[Adopted from Devitt & Blackmar, Federal Jury Practice and Instructions, § 71.07]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 20

SECTION 6 - SECOND ELEMENT

If you find by a fair preponderance of the evidence that the New York Stock Exchange or the American Stock Exchange had reason to believe or suspect that McDonnell & Co. was operating in violation of the rules, you must then consider whether or not the Exchange took any action to correct such violation. If the Exchange took any action, you must then consider whether or not the action taken was appropriate.

Now, as I have told you, plaintiffs contend that McDonnell & Co. was operating in violation of the Exchanges' rules in two particular areas -- record keeping and net capital.

In considering whether an Exchange took appropriate action to correct either of these violations, you may consider the length of time the Exchange had notice of the violation; the passage of time, if any, between the time an Exchange learned, or should have learned, of the violation and first took action to correct it; the type of action, if any, taken by the Exchange to correct the violation; and the effectiveness of such action.

In addition, you may consider the seriousness of the particular violation, the existence of which the Exchange had reason to believe or suspect. This is so because the amount of care required to be exercised by an Exchange varies

PLAINTIFFS' REQUEST TO CHARGE

in proportion to the seriousness or magnitude of the violation involved. In other word the more serious the rules violated, the more vigorous and prompt the response should be.

With regard to a net capital violation, I charge you that, as a matter of law, if you find:

(1) that an Exchange knew or had reason to believe or suspect that McDonnell & Co. was in violation of the net capital rule;

(2) that the Exchange thereafter directed McDonnell & Co. to raise additional capital; and

(3) that the Exchange failed to take appropriate steps to disclose the net capital violation to potential investors or to ascertain whether the firm had disclosed the net capital violation to potential investors,

then you must find that the action taken was not appropriate.

[See Plaintiffs' Trial Memorandum at pp. 24 through 31.]

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 21

SECTION 6 - THIRD ELEMENT

If you find that the New York Stock Exchange or the American Stock Exchange violated Section 6, you must then consider whether such violation resulted in injury to the plaintiffs. In other words, you must decide whether, if the Exchange had not violated Section 6, the plaintiffs would not have suffered injury. I believe it will be simpler if I explained this third element of Section 6 liability -- injury to the plaintiffs -- in the context of the specific transactions at McDonnell & Co.

First, with respect to the debenture roll-over, you must consider whether, if the Exchange had properly discharged its Section 6 duties, an inquiry would have been made into the authorization or non-authorization of the roll-over of the particular substitution of a Series E debenture for the Series B debenture, due and payable December 31, 1968, prior to its approval by the Exchange. Finally, with regard to this particular debenture roll-over, I charge you that if you find by a fair preponderance of the credible evidence that the roll-over was accomplished without the consent of at least two of the three trustees, then as a matter of law such a roll-over was unauthorized.

PLAINTIFFS' REQUEST TO CHARGE

Second, with respect to the stock subordination agreements by Mrs. Murphy and Mrs. McDonnell, if you find that as a result, in whole or in part, of the Section 6 violation, the plaintiffs made those investments without having been informed of the net capital violation by McDonnell & Co., then you must find that the Section 6 violation resulted in injury to the plaintiffs.

Third, with regard to the common stock purchased by Mr. McDonnell, if you find that as a result, in whole or in part, of the Section 6 violation, Mr. McDonnell made that investment without having been informed of the net capital violation by McDonnell & Co., then you must find that the Section 6 violation resulted in injury to the plaintiff.

Fourth, with regard to the preferred stock owned by the trust, if you find that as a result, in whole or in part, of the Section 6 violation, the value of the firm was reduced to such a point that the preferred stock became worthless, then you must find that the Section 6 violation resulted in injury to the plaintiff.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 22

CREDIBILITY OF WITNESSES

I told you at the beginning of the trial that one of your most important functions would be to assess the credibility of the witnesses who testified. You, as jurors, are the sole judges of the credibility of the witnesses; you and you alone must determine what weight their testimony deserves.

Preliminarily, you are to understand that you should not be influenced by the mere number of witnesses called by either side. The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. Rather, you should consider all the facts and circumstances in evidence to determine where the truth lies.

In assessing credibility, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief.

The degree of credit to be given a witness should be determined by his demeanor, his relationship to the

controversy and the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all other testimony and the attendant circumstances in the case and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

How did the witness impress you? Did his version appear straightforward and candid, or did he try to hide some of the facts? Is there a motive to testify falsely?

In passing upon the credibility of a witness, you may take into account inconsistencies or contradictions as to material matters in his own testimony, or any conflict with that of another witness, also any inconsistencies or omissions in prior testimony or any prior statement of material matters as to which he may have testified upon the trial.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection is not an uncommon experience.

A witness may be inaccurate, contradictory or untruthful in some respects and yet be entirely credible in the essentials of his testimony.

PLAINTIFFS' REQUEST TO CHARGE

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find that any witness has testified falsely you can do one or two things, you can either reject all of that witness' testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood.

In passing upon credibility, the ultimate question for you to decide is: Did the witness tell the truth here before you? It is for you to say whether his testimony at this trial is truthful in whole or in part, in the light of his demeanor, his explanations and all the evidence in the case.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 23

DEPOSITION TESTIMONY

During the trial of this case certain testimony was read to you by way of deposition consisting of sworn, written answers to questions asked of Anna M. McDonnell in advance of the trial. The testimony of a witness, such as Mrs. McDonnell, due to age and health, cannot be present to testify from the witness stand, may be presented in writing, under oath, in the form of a deposition. Such testimony is entitled to the same consideration and is to be judged as to credibility and weight, and otherwise considered by the jury in the same way as if the witness had been present and had testified from the witness stand.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 24

DUTY TO DELIBERATE

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

PLAINTIFFS' REQUEST TO CHARGE

REQUEST NO. 25

COMMUNICATIONS BETWEEN COURT AND JURY

If it becomes necessary during the course of your deliberations for you to communicate with the Court, you may send a note with the marshal, signed by your forelady, or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than by a signed writing, and the Court will never communicate with the jury on any subject touching the merits of the case otherwise than in writing, or orally here, in open Court.

You will note from the oath about to be taken by the marshals that they, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the questions before you until after you have reached a unanimous verdict.

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PLAINTIFFS' REQUEST TO CHARGE

Respectfully submitted

Davis & Cox

DAVIS & COX
Attorneys for Plaintiffs
One State Street Plaza
New York, N. Y. 10004
Tel. [212] 425-0500

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE
[Doc. 193]

[CAPTION]

71 Civ. 461 R.O.
71 Civ. 1940 R.O.

PLAINTIFFS' SUPPLEMENTARY REQUESTS TO CHARGE*

Plaintiffs respectfully request that the Court include the following instructions in its charge to the jury:

* Original Requests, numbered 1 through 25, previously submitted.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 26

The attorneys for the plaintiffs and the defendants have, in their very extended summations, fully reviewed the evidence and urged upon you their various contentions. Usually, I marshall the evidence in my charge to the jury, but summations of counsel in this case have been so thorough that if I were to follow my customary practice it would be at the risk of wearisome repetition. However, before I further instruct you on the law, I believe it would be helpful and appropriate at this time to very briefly identify the witnesses who have appeared before you, in the order in which they were called.

Before I do this, let me remind you again that with respect to any fact matter it is your recollection, and yours alone, that governs. While I have carefully gone through my notes of the testimony of the witnesses which I am about to read to you, nothing I say is to be taken in substitution for your own independent recollection; that governs at all times. Moreover, all evidence, whether or not I have referred to it, or counsel have alluded to it in their summations, is important and must be considered by you.

Now, the first witness called by the plaintiffs was Mrs. Murphy, one of the plaintiffs in this case.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

Following Mrs. Murphy's testimony, portions of the deposition testimony of Anna McDonnell, another plaintiff in this case, were read to you.

The next witness was James F. McDonnell, Jr., a plaintiff in this case both in his individual capacity and as one of the Trustees under the Will of James F. McDonnell, Sr.

The next witness was Andrew R. McElroy, an Examiner employed by the New York Stock Exchange.

Following Mr. McElroy, you heard from Herbert Schuette, who was, during 1968 and part of 1969, a Coordinator in the Department of Member Firms in the New York Stock Exchange.

After Mr. Schuette testified, additional portions of the deposition testimony of Anna McDonnell were read to you.

The next witness was George H. Newman, who was, during 1969, a Coordinator in the Department of Member Firms of the New York Stock Exchange.

After Mr. Newman you heard the testimony of Richard Greves, who was, during 1969, an Assistant Coordinator in the Department of Member Firms, and is currently an Assistant Vice President of the New York Stock Exchange.

The next witness was Robert A. Spies, who, during 1968 and 1969, was employed as the Manager of the Finance Division of the Department of Member Firms of the New York Stock Exchange.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

Following the testimony by Mr. Spies, the plaintiffs called Professor David L. Ratner.

After Professor Ratner, the next witness was Lee D. Arning, who is presently a partner in a brokerage firm in New York City and who was, during 1968 and 1969, a Vice President of the New York Stock Exchange in charge of the Departments of Stock Lists, Secretary's Office, the Floor Department and the Department of Member Firms.

Following the testimony of Mr. Arning, plaintiffs called H. Vernon Lee, Jr., who was, during 1968 and 1969, Vice President and Secretary of the American Stock Exchange.

At this point the plaintiffs rested.

The first witness for defendant McDonnell & Company in Receivership was Bruce M. Stargatt, the Receiver of McDonnell & Company. After Mr. Stargatt's testimony, defendant McDonnell & Company rested.

The first witness called by the defendant New York Stock Exchange was Thomas Ford, an attorney with the law firm of Shearman & Sterling.

Following Mr. Ford's testimony, you heard from Richard Olney, III, who was, during 1968 and 1969, employed as an Assistant Vice President and Assistant to the Chairman of McDonnell & Company.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

The next witness was Paul K. McDonald, who, from July 1, 1969 to approximately March 17, 1970, was employed in various capacities at McDonnell & Company and eventually became President, Chief Executive Officer, and sole Trustee of the Voting Trust at that firm.

Following Mr. McDonald's testimony, portions of the deposition of Fred J. Stock were read to you. During 1968 and 1969 Mr. Stock was an Assistant Vice President and an Associate Director of the Department of Member Firms of the New York Stock Exchange.

The next witness we heard from was Robert M. Bishop, who is presently a Senior Vice President of the New York Stock Exchange, and was, during 1968 and 1969, Director of the Department of Member Firms of the New York Stock Exchange.

Following Mr. Bishop's testimony, further portions of the deposition of Fred J. Stock were read to you.

At that point, defendant New York Stock Exchange rested.

Plaintiffs then presented their redirect case, recalling as witnesses Margaret Murphy and James F. McDonnell, Jr.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 27

AIDING AND ABETTING - ELEMENTS DEFINED
(Request No. 16 Revised)

In connection with these elements, some further explanation would be helpful.

With respect to the first element, that is that the Exchange had knowledge, or, but for a breach of a duty of inquiry, should have had knowledge of the fraud, I charge you that under the provisions of Section 6 of the Securities Exchange Act, an Exchange has a duty to regulate and supervise its member firms, and such duty includes a duty of inquiry.

With respect to the second element, I charge you that, as a matter of law, an Exchange must comply with the provisions of the Securities Exchange Act, and those provisions include a requirement for full disclosure.

In determining whether an Exchange is liable as an aider and abettor, if you find that an Exchange had knowledge of a fraudulent transaction, the first element is satisfied. You must then consider whether the Exchange disclosed. If you find that the Exchange failed to make disclosure, then the second element of aiding and abetting is fulfilled.

If, however, in considering the first element, you should find that an Exchange did not have actual knowledge,

you must then consider whether it should have knowledge of a fraud but for a breach of a duty of inquiry. In this connection, you must consider any evidence concerning the care or lack of care taken by the Exchange in discharging its regulatory function with regard to McDonnell & Co. Thus, if you should find that an Exchange did not exercise reasonable care in regulating McDonnell & Co. and would have discovered the fraudulent transaction if such care had been exercised, then proof of aiding and abetting is complete.

[Hochfelder v. Midwest Stock Exchange, 379 F.Supp. 1122 (N.D. Ill. 1972), aff'd, 503 F.2d 364 (7th Cir.), cert. denied, 43 U.S.L.W. 3202 (U.S. Oct. 15, 1974), Hochfelder v. Ernst & Ernst, [Current] CCH Fed. Sec. L. Rep. ¶ 94,781 (7th Cir. 1974), cert. granted, 43 U.S.L.W. 3545 (U.S. Apr. 5, 1975); SEC v. Spectrum Ltd., 489 F.2d 535 (2d Cir. 1973).]

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PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 28

FAMILY RELATIONSHIPS - NO DEFENSE

There has been some testimony in this case concerning the family relationships between the plaintiffs and the various officers and directors of McDonnell & Company. Should you find that a defendant violated any of the sections of the Federal Securities Laws I have described for you in connection with any of the transactions at issue, I charge you that the existence of a family relationship between the plaintiffs and certain officers and directors of McDonnell & Company is not, in and of itself, a defense to such violation.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 29

MEASURE OF DAMAGES

Should you find a defendant liable to a particular plaintiff under any of the legal theories I have just explained, you must then proceed to determine the amount of damages to be awarded to that plaintiff.

The appropriate measure of damages in a case such as this is the value of a particular plaintiff's investment in McDonnell & Co. at the time such investment was made, less the current value, if any, of such investment.

Thus, in connection with the subordination agreement by Mrs. Murphy, in assessing damages you must first decide what the evidence shows as to the value of the securities in Mrs. Murphy's account at the time of the subordination. Then you must subtract from the amount you have found what you find to be the present value of Mrs. Murphy's investment. The resulting figure will be the damages to which Mrs. Murphy is entitled.

Similarly, with respect to the subordination agreement by Mrs. McDonnell, you must first determine what the evidence shows as to the value of the securities deposited in Mrs. McDonnell's account at the time of the subordination. Again, you should subtract from that amount what you find to

be the present value of Mrs. McDonnell's investment. The resulting figure will be the damages to which Mrs. Murphy is entitled.

In connection with the stock purchases by Mr. McDonnell, you must first determine what the evidence shows as to the amount paid by Mr. McDonnell for the 300 shares of common stock in McDonnell & Co. You must then subtract from that figure what you find to be the current value of that stock. Again, the resulting figure will be the damages to which Mr. McDonnell is entitled.

With respect to the Trust and the rollover of the Series B debenture, in assessing damages you must first decide what the evidence shows as to the amount payable under the terms of the Series B debenture as of the date it was exchanged for the Series E debenture. You must then subtract from that amount what you find to be the value of the Series E debenture. The resulting figure will be the damages to which the Trust is entitled in connection with the rollover.

Again, with respect to the Trust and the 797 shares of the preferred stock of McDonnell & Co., in assessing damages you must first decide what the evidence shows as to the amount the Trust was entitled to receive in the event of liquidation under the terms of the stock, and then subtract from that figure the amount, if anything, received by the Trust

for those shares at the time McDonnell & Co. was liquidated. The resulting figure will be the damages the Trust is entitled to receive in connection with the 797 shares of preferred stock.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 30

MEASURE OF DAMAGES - DATE OF WRONG

Should you find a defendant liable to a particular plaintiff, in addition to determining the amount of damages to be awarded to that plaintiff you must also determine the date of the wrongful act for which the plaintiff is entitled to damages.

This is so because under the law, in a case such as this, the plaintiff is entitled to receive interest on the amount of damages you assess from the date of the wrongful act. You need not concern yourselves with the calculation of the amount of interest to be awarded; that is the function of the Court should you determine that a particular plaintiff is entitled to damages.

Thus, in the form of verdict which will be submitted to you, questions will be included concerning the dates on which you find any wrongful acts to have occurred. One of the things you must find, therefore, in deciding this case, will be what the evidence shows as to the date on which Mrs. Murphy subordinated her account, Mrs. McDonnell subordinated her account, Mr. McDonnell purchased his stock, and the date on which the Series B debenture was exchanged for the Series E debenture. With respect to the preferred stock owned by the

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

Trust, the date you must determine would be the date on which that stock became valueless, should you find that that stock, in fact, became valueless.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 31

JOINT AND SEVERAL LIABILITY

When the acts or omissions of two or more defendants contribute concurrently to the injury and damage of a plaintiff, each of such defendants is liable for the full extent of the damages suffered by such plaintiff. Thus, such defendants are said to be jointly and severally liable for the injuries resulting to plaintiff.

Should you find that more than one defendant is liable to a particular plaintiff in this case, you should not, in assessing damages, divide the amount you have decided the plaintiff is entitled to receive by the number of defendants you have found liable to that particular plaintiff. Each of such defendants is individually liable for the full extent of the damages you have awarded a particular plaintiff.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 32

NO INFERENCE TO BE DRAWN
FROM INSTRUCTION ON DAMAGES

The fact that I have instructed you as to the proper measure of damages should not be considered by you as intimating any view of the Court as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of a plaintiff by the fair preponderance of the evidence in the case in accordance with the instructions I have given you for the determination of liability.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

SUPPLEMENTARY REQUEST NO. 33

EXPERT TESTIMONY

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for such opinions.

You should consider each expert opinion received in evidence in this case, and give it such weight as you think it deserves. If you should decide that the opinion of an expert is not based upon sufficient education and experience, or if you should find that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion. However, should you find that the opinion and the reasons given in support thereof are sound and credible, you may consider that opinion together with all the other evidence before you in reaching your determination as to the disputed issues in this case.

PLAINTIFFS' SUPPLEMENTARY REQUEST TO CHARGE

Respectfully submitted,

Davis & Cox

DAVIS & COX
Attorneys for Plaintiffs
One State Street Plaza
New York, N. Y. 10004
Tel. [2]2] 425-0500

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NYSE'S REQUEST TO CHARGE

[Doc. 206]

[CAPTION]

71 Civ. 460 (R.O.)

71 Civ. 1940 (R.O.)

Defendant New York Stock Exchange, Inc. (hereinafter the "Exchange") hereby requests the Court to charge the jury as follows:*

1. In this case the plaintiffs are Anna M. McDonnell, James F. McDonnell, Jr., and Margaret Mary McDonnell Murphy. In addition Anna M. McDonnell and James F. McDonnell, Jr. are asserting claims as Trustees under a Trust created by James F. McDonnell -- the deceased husband of Anna M. McDonnell and father of James McDonnell Jr. For convenience the plaintiffs are trying their cases together, but it is critical to keep in mind that each of their claims as against each defendant should be considered by you separately.

2. Plaintiffs Anna M. McDonnell and James F. McDonnell, Jr. have named McDonnell & Co., the New York

* The Exchange previously has submitted to the Court a motion for summary judgment dismissing the amended complaints as to the Exchange. These requests to charge are submitted should the Court not have dismissed the consolidated actions as to the Exchange by the conclusion of the trial.

Stock Exchange, Inc. (which I will refer to as the Exchange) and the American Stock Exchange, Inc. (which I will refer to as the Amex) as defendants. Plaintiff Margaret Mary McDonnell Murphy has named McDonnell & Co. and the Exchange as defendants in her action. McDonnell & Co. was a stock brokerage firm which was a member firm of the Exchange and of the Amex. Both exchanges are national securities exchanges. Throughout your deliberations, not only must you keep in mind the facts surrounding each of the claims of each plaintiff, but you also must consider separately each of the plaintiff's claims against each of the defendants. Unless otherwise stated, you should consider each instruction given to apply separately and individually to each claim as it relates to each plaintiff and to each defendant.

3. In your deliberation you must consider all parties to this action -- whether individuals or partnerships or corporations -- as being equal citizens under the law. A corporation, including a stock exchange, is entitled to the same fair trial at your hands as a private individual. All persons, including individuals, partnerships and corporations, whether rich or poor, stand equal before the law, and are to be dealt

with as equals in a court of justice.

4. Both plaintiffs Anna McDonnell and Margaret Murphy are claiming that in January or February of 1969 when they contributed subordinated capital to McDonnell & Co. material misrepresentations or omissions were made to them by certain officers of McDonnell & Co. Both plaintiffs also claim that misrepresentations or omissions were made to them in September or October by McDonnell & Co. when they consented to a recapitalization of McDonnell & Co. whereby their subordinated investments were exchanged for preferred stock and installment notes. Plaintiff James F. McDonnell, Jr. is claiming that he similarly was the victim of misrepresentations and omissions by certain officers of McDonnell & Co. in connection with his purchase of 300 shares of voting stock of McDonnell & Co. in March or April of 1969. Plaintiffs Anna M. McDonnell and James F. McDonnell, Jr. as trustees of the Estate of James F. McDonnell are claiming that McDonnell & Co. improperly exchanged a Series B debenture which was an asset of the trust estate for a Series E debenture to become due at a later date. All plaintiffs also allege that the Exchange is responsible for the alleged fraudulent acts of McDonnell & Co. All plaintiffs are also

claiming that the Exchange improperly regulated McDonnell & Co. and thereby proximately caused damage to the plaintiffs in respect to the investments which they made in McDonnell & Co. and which I have just described to you. In addition, Anna McDonnell and James F. McDonnell, Jr. as trustees are claiming that 797 shares of preferred stock in McDonnell & Co. which was an asset of the trust estate was damaged by this alleged failure to regulate properly on the part of the Exchange.

5. As you consider each claim as between each plaintiff and each defendant, keep in mind that the plaintiffs have the burden of proof as to each necessary element of each claim against each defendant in order to prevail on that claim as against that defendant. Each plaintiff must meet his or her burden of proof by a preponderance of the evidence. This means that the evidence on the plaintiff's side of the issue must outweigh the evidence on the defendant's side as to each necessary element of each claim made by the plaintiff against a particular defendant for you to find in favor of the plaintiff on that claim against that defendant. I will now instruct you on the claims made and the necessary elements of each.

NYSE'S REQUEST TO CHARGE

Federal Fraud Claims

6. Each of the plaintiffs has claimed that the defendants -- acting through their officers and employees -- have acted fraudulently toward him or her in connection with their various capital contributions to McDonnell & Co. Under the federal securities laws, in order to return a verdict for a plaintiff against a defendant, that plaintiff must prove as against that defendant by a preponderance of the evidence each of the five elements of a violation of what is called Rule 10b-5.

7. The five elements a plaintiff must establish by a preponderance of the evidence against any defendant in order for that defendant to be found liable are as follows:

a. The defendant made statements to plaintiffs in connection with the plaintiffs' investment in McDonnell & Co. which contained untrue statements of fact or omitted to state facts necessary in order to make the statements which were made true;

b. the untrue statement or omitted facts were material;

c. the plaintiffs fulfilled a duty of due care by seeking to ascertain the facts

NYSE'S REQUEST NO. CHARGE

relevant to their transactions with McDonnell & Co.

d. the plaintiffs relied on the untrue or misleading statements of fact; and

e. the defendant either knew the statements were untrue, or, knew of or recklessly disregarded the existence of omitted facts which if disclosed would have shown that the statements made were misleading.

8. First, each plaintiff must prove by a preponderance of the evidence that in connection with each plaintiff's contribution of capital to McDonnell & Co. the officers or employees of the defendant to be charged made untrue statements of fact or omitted to state facts necessary in order to make the statements which were made not misleading in the light of the circumstances.

9. In considering the foregoing, you should decide what statements, if any, were made to each plaintiff by each defendant in connection with each plaintiff's contribution of capital to McDonnell & Co. It is your responsibility to determine what statements by officers or employees of a defendant to plaintiffs

led plaintiffs to contribute capital to McDonnell & Co. These statements can be made to plaintiffs orally or in writing.

10. You should next consider whether any statement of fact was false at the time it was made. In this connection there is a difference between a statement of fact and a statement of an opinion. A statement of opinion is false only if the person making the statement does not believe what he is saying -- that is, the opinion falsely portrays the speaker's state of mind.

Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968);

2 Bromberg Securities Law, § 8.2 (1973)

11. If you conclude that untrue statements were made to plaintiffs, the second element which plaintiffs must also prove by a preponderance of the evidence is that the untrue statements, or any omissions of facts, were material. The basic test of materiality is whether a reasonable man or woman placed in the precise situation of each plaintiff would have acted upon the facts misrepresented or omitted in determining his or her course of action in the transaction in question.

List v. Fashion Park Inc., 340 F.2d 457 462 (2d Cir.), cert. denied 382 U.S. 811 (1965)

NYSE'S REQUEST TO CHARGE

Titan Group, Inc. v. Faggen, CCH Fed. Sec. L.Rep. ¶95,042 (2d Cir. 1975)

12. It is possible that what might be material under some circumstances would not be material under other circumstances. In determining materiality, the reasonable man or woman should be viewed as being in the precise situation of the plaintiffs and as having all of the characteristics of the plaintiffs including factors such as knowledge in their own right, family relationships, business judgment, and sophistication.

Titan Group, Inc. v. Faggen, supra;

Taylor v. Smith Barney & Co. Incorporated, 358 F.Supp. 892, 895 (D. Utah 1973).

13. Each plaintiff also must establish by a preponderance of the evidence that he or she fulfilled a duty of due care in seeking to find out for himself or herself the facts relevant to each contribution of capital to McDonnell & Co. In determining whether a plaintiff's own investigation of the transaction was adequate, you should consider factors such as the plaintiff's education, business sophistication and expertise, his or her access to information, and any special relationship which the plaintiff may have with McDonnell & Co. or the officers of McDonnell & Co. You should also consider such things as whether a plaintiff read

material made available to that plaintiff or whether a plaintiff asked questions that a reasonable person would ask under the circumstances. Unless you find that a particular plaintiff satisfied this duty of due care, you must return a verdict for the defendant.

Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 103 (5th Cir. 1970), cert. denied 402 U.S. 988 (1971)

City National Bank of Fort Smith, Ark. v. Vanderboom, 422 F.2d 221 (8th Cir. 1970), cert. denied 399 U.S. 905 (1970)

Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), cert. denied 395 U.S. 903 (1969)

14. Even if you find for a plaintiff on each of the previous instructions, you must return a verdict for the defendant unless a plaintiff also proves by a preponderance of the evidence that he or she reasonably relied on the material misrepresentation and omissions in deciding to invest capital in McDonnell & Co. To establish reliance, a plaintiff must establish by a preponderance of the evidence that the material misrepresentation or omission was a substantial factor in determining the course of conduct which resulted in his or her loss.

Cohen v. Franchard, 478 F.2d 115, 124 (2d Cir.), cert. denied 414 U.S. 857 (1973)

NYSE'S REQUEST TO CHARGE

You should ask yourself what was the basis upon which each plaintiff decided to invest capital in McDonnell & Co. You must consider the plaintiff's sophistication and business sense. If it appears that a plaintiff did not rely on any facts which you concluded were materially misleading, then the misstatements cannot be regarded as a substantial factor in deciding whether or not to invest capital in McDonnell & Co. In short, for there to be a basis for finding a defendant liable, the representation must have had a substantial influence upon the plaintiffs' action and have been a substantial factor in bringing about that transaction. If you find that a plaintiff invested in McDonnell & Co. for any reasons other than the material misrepresentations or omissions -- such as a sense of loyalty or obligation to the family brokerage firm -- you must return a verdict on the fraud claim for the defendant. In this regard, keep in mind that the Federal securities laws are not intended to establish a scheme of investors' insurance, but only to shift the burden of loss where there has been a material misstatement or omission which was relied upon to a plaintiff's loss and where the plaintiff exercised due care.

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List v. Fashion Park Inc., supra. at 462;

Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968);

Pollak v. Eastman Dillon, CCH Fed. Sec. L. Rep. ¶ 94,987 at p. 97, 408 (S.D.N.Y. 1975)

Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112 (S.D.N.Y. 1974)

15. Even if you find that a particular plaintiff has proved by a preponderance of the evidence that a defendant made material misrepresentations or omissions to that plaintiff, you must return a verdict for the defendant unless you find by a preponderance of the evidence that the defendant's conduct demonstrated willful, deliberate or reckless disregard for the truth. Each plaintiff must prove by the preponderance of the evidence that the defendant to be held liable had actual knowledge of any fraudulent misrepresentations or omissions which that defendant made or that the defendant's failure to discover the falsity of the misrepresentation or omission it unknowingly made amounted to a willful, deliberate or reckless disregard for the truth or that a defendant knowingly or recklessly used a scheme to defraud plaintiff.

NYSE'S REQUEST TO CHARGE

Cohen v. Franchard, supra;

Lanza v. Drexel & Co., 479 F.2d 1277, 1304-06 (2d Cir. 1973) (en banc).

Liability of the Exchange as a Principal For Fraudulent Misstatements or Omissions

16. You cannot return a verdict for the plaintiffs and against the Exchange as a principal violator of Rule 10b-5, unless you first find by a preponderance of the evidence that misrepresentations and omissions of material fact were knowingly made to plaintiffs by the officers and employees of McDonnell & Co., that plaintiffs exercised due care in entering these transactions with McDonnell & Co., and that these misrepresentations or omissions of material fact were relied upon by plaintiffs in entering into the transactions in question with McDonnell & Co.

(10b-5 charges, supra)

17. Even if you find that McDonnell & Co. defrauded plaintiffs, if you find that the Exchange was not a party to the transactions by which plaintiffs contributed capital to McDonnell & Co., and that its conduct was solely that of inaction, you must find that the Exchange has no liability as a principal for misrepresentations and omissions that may have been made

by others to plaintiffs.

Hochfelder v. Midwest Stock Exchange, 350 F.Supp. 1122 (N,D. Ill. 1972), aff'd, 503 F.2d 364 (7th Cir.), cert. denied 419 U.S. 875 (1974)

Wessell v. Buhler, 437 F.2d 279 (9th Cir. 1971);

Beebe v. McDonnell & Co., 70 Civ. 1010 (N.D. Ill. Sept. 1, 1972) (findings of fact and conclusions of law unpublished but attached to Exchange's trial Memorandum at Appendix 2a et seq.).

18. Even if you find that McDonnell & Co. defrauded plaintiffs and that the Exchange was a party to the transactions by which the plaintiffs contributed capital to McDonnell & Co., since the duty of the Exchange is not that of a fiduciary or an insurer, you must return a verdict for the Exchange on the claim that it is liable as a principal unless plaintiffs prove by a preponderance of the evidence that the Exchange had actual knowledge of the fraudulent misrepresentations or omissions by others or that the Exchange's failure to discover such misrepresentations or omissions amounted to a willful, deliberate or reckless disregard for the truth, or that the Exchange knowingly or recklessly used a scheme to defraud plaintiffs.

Cohen v. Franchard, supra;

NYSE'S REQUEST TO CHARGE

Baird v. Franklin, 141 F.2d 238, (2d Cir.) cert. denied, 323 U.S. 737 (1944)

Steinberg v. Merrill Lynch, Pierce, Fenner & Smith, CCH Fed. Sec. Law Rep. ¶94,599 (S.D.N.Y. 1974)

Hochfelder v. Midwest Stock Exchange, supra.

Aiding and Abetting

19. The next claim to be considered is whether the Exchange aided and abetted McDonnell & Co. in making any material misrepresentations or omissions to the plaintiffs in connection with each plaintiff's contribution of capital to McDonnell & Co. Under this count, plaintiffs must prove by a preponderance of the evidence that McDonnell & Co. defrauded the plaintiffs and that the Exchange knew of the fraud being done by McDonnell & Co. and knowingly gave substantial assistance or encouragement to McDonnell & Co. in the commission of that fraud. Of course, many of the elements which plaintiffs must prove by a preponderance of the evidence are identical to the elements which plaintiffs had to prove under the previous count.

20. The first element which plaintiffs must prove by a preponderance of the evidence is that misrepresentations and omissions were made to plaintiffs by the only defendant who communicated with them --

McDonnell & Co. (See 10b-5 charges, supra)

21. The second element which plaintiffs must prove by a preponderance of the evidence is that any misrepresentations or omissions which you might find were made were material. (See 10b-5 charges, supra)

22. The third element which plaintiffs must prove by a preponderance of the evidence is that each plaintiff exercised due care before entering into the capital transactions with McDonnell & Co. (See 10b-5 charges, supra)

23. The fourth element which each plaintiff must prove is reliance upon any material misrepresentation or omission which you find was made by McDonnell & Co. in connection with a plaintiff's capital contribution. (See 10b-5 charges, supra)

24. Up to now, all of the elements which you have considered on this aiding and abetting claim concern a wrongdoing which you might find was committed by McDonnell & Co. In order to return a verdict for a plaintiff and against the Exchange as an aider and abettor, plaintiffs must prove by a preponderance of the evidence that the Exchange knew of any wrongdoing which you might find was committed by McDonnell & Co. --

that is, that the Exchange knew that those who dealt with plaintiffs were defrauding them. You must return a verdict for the Exchange if you find that the Exchange did not have actual knowledge of any misrepresentations or omissions which might have been made by the principals of McDonnell & Co. to their relatives -- the plaintiffs in this action.

Hochfelder v. Midwest Stock Exchange, supra

Hughes v. Dempsey - Tegler & Co. CCH Fed. Sec. Law Rep. ¶ 94,133 (C.D. Cal. 1973)

Fischer v. Kletz, 266 F.Supp. 180, 197 (S.D.N.Y. 1967)

25. Furthermore, even if you find for the plaintiffs on each of the five previous elements of the aiding and abetting claim, you must return a verdict for the Exchange if plaintiffs do not prove by a preponderance of the evidence that the Exchange knowingly gave substantial assistance or encouragement to any wrongdoing by McDonnell & Co. In other words, you must return a verdict for the Exchange unless plaintiffs prove by a preponderance of the evidence that the Exchange knowingly took significant action in order to assist or encourage McDonnell & Co. to commit fraud upon the plaintiffs through the principals of McDonnell

& Co. who dealt with plaintiffs.

Hochfelder v. Midwest Stock Exchange, supra

Fischer & Kletz, supra

Hughes v. Dempsey-Tegler, supra

Pettit v. American Stock Exchange, 217 F.Supp. 21 (S.D.N.Y. 1973)

Controlling Person Claims

(This charge is requested only if the Court construes the McDonnell amended complaint to plead adequately a controlling person claim)

26. In this claim, which is pleaded only by plaintiffs Anna and James F. McDonnell, Jr., it is claimed that the Exchange was a controlling person of McDonnell & Co. and should be held accountable for any wrongdoings of McDonnell & Co. A pre-requisite for this claim is that you have first found that McDonnell & Co. defrauded plaintiffs. Plaintiffs must then also prove by a preponderance of the evidence that the Exchange actually controlled McDonnell & Co. and that the Exchange did not act in good faith and knowingly induced McDonnell & Co. to commit fraud upon Anna and James McDonnell.

27. First, plaintiffs McDonnell must establish by a preponderance of the evidence that the

Exchange was in control of McDonnell & Co. While deliberating upon this element, you should consider whether the Exchange directed the daily management and workings of McDonnell & Co. and participated in decisions which the normal management of any business makes in respect to the business. The mere fact that as a regulator the Exchange regulated McDonnell & Co. is insufficient to make the Exchange a controlling person of McDonnell & Co. You must return a verdict for the Exchange if you fail to find that the Exchange stepped into the role normally reserved for the management in the running of McDonnell & Co.

Lanza v. Drexel, supra, at 1299.

28. Second, even if you find that the Exchange had the status of a controlling person of McDonnell & Co., you must return a verdict for the Exchange on the controlling person claim unless plaintiffs Anna and James McDonnell prove by a preponderance of the evidence that the Exchange did not act in good faith in connection with plaintiffs' contribution of capital to McDonnell & Co. Plaintiffs must prove that the Exchange actually knew of fraudulent representations or omissions made by McDonnell & Co. personnel to these plaintiffs and failed to take reasonable

action to remedy the fraud, or that the Exchange participated in any misrepresentations or omissions for the purpose of defrauding the plaintiffs.

Gordon v. Burr, CCH Fed. Sec. L. Rep. ¶94,874 at p. 96,905 (2d Cir. 1974)

Section 6 Claim

29. The New York Stock Exchange is a national securities exchange registered with the Securities and Exchange Commission, a government agency known as the SEC. As such, the Exchange might be considered a quasi-governmental agency. The Exchange had adopted a Constitution and Rules which have been approved by the SEC. The Exchange and its rules are subject to the surveillance by the SEC. It is plaintiffs' claim that the Exchange did not properly enforce its rules, the Securities Exchange Act of 1934, and the rules thereunder in respect to McDonnell & Co.

30. The duty of the Exchange is the duty of enforcement, which means to obtain compliance by its members with the applicable rules "so far as is within its powers". The Exchange's duty is not that of a guarantor or a fiduciary. In fulfilling its duty, the Exchange is not required to be perfect or fluoroscopic.

Exchange Act, Section 6(a)(1);

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Baird v. Franklin, supra;

Hochfelder v. Midwest Stock Exchange, supra;

Hughes v. Dempsey-Tegler, supra;

Intercontinental Industries Inc. v. American Stock Exchange, 452 F.2d 935, 940 (5th Cir. 1971), cert. denied 409 U.S. 842 (1972).

Steinberg v. Merrill Lynch, Pierce, Fenner & Smith, supra;

Rich v. New York Stock Exchange, CCH Fed. Sec. L.Rep. ¶ 94,736 (S.D.N.Y.), appeal docketed No. 74-2242 (2d Cir. 1974).

31. But before the Exchange has any duty to enforce, plaintiffs must show by a preponderance of the evidence that the Exchange knew, or reasonably should have known, that McDonnell & Co. was in violation of a rule applicable to it.

Marbury Management, Inc. v. Kohn, 373 F.Supp. 140 (S.D.N.Y. 1974);

Butterman v. Walston, 387 F.2d 822 (7th Cir. 1967), cert. denied, 391 U.S. 913 (1968);

Hochfelder v. Midwest Stock Exchange, supra;

Pettit v. American Stock Exchange, supra;

Schonholtz v. American Stock Exchange, 376 F.Supp. 1089 (S.D.N.Y.), aff'd 505 F.2d 699 (2d Cir. 1974).

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32. If plaintiffs can show by a preponderance of the evidence that McDonnell & Co. was in violation, and that the Exchange knew or should have known of the violation, you must consider whether the Exchange's response was a reasonable, good faith effort to deal with the violation in the public interest. Under the applicable law, national securities exchanges such as the Exchange must be accorded substantial discretion, flexibility and initiative in interpreting and obtaining compliance with their own rules in the public interest. In particular circumstances there may well be several alternative ways in which the Exchange can reasonably and in good faith handle the problems presented in order to obtain compliance by its members and protect the public.

Gordon v. New York Stock Exchange, 498 F.2d 1303 (2d Cir.), cert. granted 43 U.S.L.W. 3295 (1974);

Hughes v. Dempsey-Tegler, supra;

Intercontinental Industries Inc. v. American Stock Exchange, supra;

J.R. Williston & Beane, Inc. v. Haack, 387 F.Supp. 173 (S.D.N.Y. 1974)

33. In determining whether or not the Exchange properly responded to known violations by McDonnell & Co., you must give great weight to the action or inaction of the SEC. If you find that the

NYSE'S REQUEST TO CHARGE

SEC had knowledge of the Exchange's program for regulating McDonnell & Co. and failed to take any action against the Exchange for improper regulation, you must be very hesitant in returning a verdict against the Exchange. You must also be very hesitant in returning a verdict against the Exchange if you find that the SEC knew of the condition of McDonnell & Co. and at the time it gained this knowledge took no action against McDonnell & Co.

Exchange Buffet Corp. v. New York Stock Exchange, 244 F.2d 507, 510 (2d Cir. 1957);

Crimmins v. American Stock Exchange, Inc., 346 F.Supp. 1256, 1261 (S.D.N.Y. 1972);

Securities and Exchange Commission v. Sorg et al., (S.D.N.Y. 1975) (unpublished opinion).

See also,

San Francisco Mining Exchange v. Securities and Exchange Commission, 378 F.2d 162 (9th Cir. 1967).

33 (as modified). You must be very hesitant in returning a verdict against the Exchange if you find that the SEC knew of the condition of McDonnell & Co. and at the time it gained this knowledge took no action against McDonnell & Co. as the SEC could have done under its concurrent power to regulate Exchange member firms.

Securities Exchange Act of 1934, Section 19(a);

Exchange Buffet Corp. v. New York Stock Exchange, 244 F.2d 507, 510 (2d Cir. 1957);

NYSE'S REQUEST TO CHARGE

Crimmins v. American Stock Exchange, Inc., 346 F.Supp. 1256, 1261 (S.D.N.Y. 1972);

Securities and Exchange Commission v. Sorg et al., (S.D.N.Y. 1975) (unpublished opinion).

34. You may not find the Exchange liable for a failure of enforcement unless plaintiffs prove by a preponderance of the evidence that in respect to its enforcement program for McDonnell & Co., the Exchange failed to act reasonably and in good faith to take action to protect the public at the time and under all of the circumstances. The Exchange's regulatory program for McDonnell & Co. should not be judged from hindsight but from the vantage point of those who were called on to make the regulatory decisions in the public interest at the time and under the circumstances then existing.

Hughes v. Dempsey-Tegler, supra;

Rich v. New York Stock Exchange, supra;

Proximate Cause Required Under Section 6

35. You must further keep in mind that this is a trial and not a legislative inquiry. It is essential that plaintiffs prove by a preponderance of the evidence that the Exchange directly caused them harm. You must ask yourselves the question: How has the Exchange's breach of duty to obtain compliance (if you

find such a breach) hurt these plaintiffs. Even if you find that the Exchange failed to apply a proper enforcement program in respect to McDonnell & Co., you must return a verdict for the Exchange on plaintiff's claim of failure to enforce unless each plaintiff proves by a preponderance of the evidence that he or she suffered money damage which was proximately caused by the Exchange's failure to properly enforce in respect to McDonnell & Co. That is, each plaintiff must prove that (a) his or her investment in McDonnell & Co. would have been more valuable had the Exchange suspended McDonnell & Co. at some time prior to March 1970 or in some other way regulated McDonnell & Co. differently that the Exchange did, and that (b) it was the Exchange's duty to regulate in that different manner.

Baird v. Franklin, supra;

Butterman v. Walston, supra;

Marbury Management Inc. v. Alfred Kohn, Wood Walker & Co., supra.

36. You will recall that Anna and James F. McDonnell as Trustees are claiming for a debenture which they claim was wrongfully exchanged for another debenture by the chief executive officer of McDonnell & Co. who was also their co-trustee. As to this claim, I instruct you that the law will charge the plaintiff

trustees with notice and knowledge of whatever he or she would have learned upon making such inquiry as it would have been reasonable to expect him or her to make under the circumstances. Knowledge or notice may also be established by circumstantial evidence. If it appears that the Series E debenture had been in existence for a substantial period of time and that Anna McDonnell and James McDonnell had regular opportunities to ascertain this fact, and that it would have been reasonable to expect payment of the Series B debenture when it was due on December 31, 1968, then you may draw the inference that Anna McDonnell and James McDonnell had knowledge of the exchange of the Series B debenture for the Series E debenture. Should you find that either Anna McDonnell or James McDonnell knew or were reasonably sure of knowing that the Series B debenture had been exchanged for the Series E debenture, and knowing this, failed to take prompt action challenging the transaction, then you may find that one or both consented to the exchange of the debentures and thereby took the risk of continuing this investment in McDonnell & Co. If you so conclude, you must return a verdict for the defendants.

Matter of Junkersfeld, 244 App.Div. 260 (2d Dept. 1935);

Matter of Tuttle, 280 App.Div. 868 (2d Dept. 1952), aff'd 306 N.Y. 720 (1953).

NYSE'S REQUEST TO CHARGE

37. When considering the claim for the debenture as against the Exchange, you must also keep in mind that the Exchange was entitled to rely on the representations of T. Murray McDonnell if the Exchange in good faith had no reason to doubt that he had authority to exchange the debenture.

38. Similarly, the Exchange was entitled to rely on the audit report of Lybrand, Ross if the Exchange had no reason to question Lybrand's finding that the Series B debenture had been properly exchanged for the Series E debenture.

Estoppel

39. The law does not permit a claimant to walk away from the opportunity to save herself from loss and then make a claim against someone else to make good her loss. If you find that plaintiffs Anna McDonnell and Margaret Murphy discovered that McDonnell & Co. was in danger of collapsing with the consequent loss of their investment, and they nevertheless did not take an available opportunity to save their investment by withdrawing it, or did not use due diligence to learn that such an opportunity was available, you must return a verdict against them even if you find that in all other respects they are entitled to recover.

NYSE'S REQUEST TO CHARGE

Rescission

40. If you find that any of the plaintiffs are entitled to relief on their fraud claims against any defendant, you must determine whether that plaintiff is entitled to rescission of his or her agreements with McDonnell & Co. In order to be entitled to rescission, each plaintiff must prove by a preponderance of the evidence that a demand for rescission was made promptly upon discovery of the alleged fraud. If you find that each plaintiff knew of the alleged fraud by the time this action was commenced in 1971, you cannot grant plaintiffs recission of their agreements.

Baumel v. Rosen, 412 F.2d 571, 574, (4th Cir. 1969), cert. denied 396 U.S. 1037 (1970).

41. Even if you find by a preponderance of the evidence that plaintiffs are entitled to rescission of their agreements with McDonnell & Co., you cannot grant recission as a remedy against the Exchange unless you find by a preponderance of the evidence that the Exchange actively and knowingly participated in the allegedly fraudulent transactions.

Gordon v. Burr, supra.

42. In calculating any damages to which plaintiffs may be entitled, if any, plaintiffs have

the burden of proving with certainty that they suffered actual damages.

Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, supra.

43. The proper method of calculating damages, if any, for plaintiffs in this action is to calculate the difference between the value of the thing purchased by plaintiffs and the value of the thing exchanged for it.

Restatement of the Law, Torts, § 549;

Levine v. Seilon, Inc., 439 F.2d 328, 334 (2d Cir. 1971).

44. Viewing the entering into of subordination agreements as the purchase by plaintiffs of investment contracts, plaintiffs' damages, if any, would be calculated as the difference between the purchase price of the investment contract ("the replacement value of the securities today") and the true value of the investment contract.

45. The only possible transaction for which plaintiff Anna McDonnell can recover damages for fraud is the addition to her subordinated account in January, 1969. She had no fraud claim for the securities in account prior to January 30, 1969 because there is no fraud claimed as to the deposit of those securities which had been made prior to 1969.

NYSE'S REQUEST TO CHARGE

46. This completes my instructions to you on the law to be applied to the facts. Remember, you must consider each claim separately as between each plaintiff and each defendant.

47. Finally, you must be unanimous in your verdict on each claim and as between each plaintiff and each defendant.

Dated: New York, N.Y.
April 28, 1975

MILBANK, TWEED, HADLEY & McCLOY

By /s/ Russell E. Brooks
(A member of the firm)

1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

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NYSE'S SUPPLEMENTAL REQUEST TO CHARGE

[Doc. 188]

[CAPTION] 71 Civ. 460 (R.O.)
71 Civ. 1940 (R.O.)

Defendant New York Stock Exchange, Inc. hereby additionally requests the Court to charge the jury as follows:

4(a). It is the province of the jury to determine the credibility of each witness and the weight to be given to his or her testimony. In weighing the testimony of each witness the jury should consider his or her relationship to the parties in this case; the witness' interest, if any, in the outcome of this case; his or her manner of testifying; his or her candor, fairness and intelligence; and the extent to which he or she has been corroborated or contradicted, if at all, by other credible evidence. If you believe that a witness has willfully sworn falsely to any material fact in issue, you may disregard his or her testimony in whole or in part.

In weighing the credibility of the witnesses and their testimony you should rely upon your own good judgment, your common sense, and the experience you

have gained in your everyday affairs. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony.

32(a). The Exchange has no duty to make public the fact that a member organization is having financial or operational difficulties or is under Exchange surveillance.

Independent Investor Protective League v. New York Stock Exchange, 367 F.Supp. 1376 (S.D.N.Y. 1973, Lasker, J.)

Rich v. New York Stock Exchange, 379 F.Supp. 1122 (S.D.N.Y.), appeal docketed No. 74-2242 (2d Cir. 1974).

Dated: New York, N. Y.
May 6, 1975

MILBANK, TWEED, HADLEY & McCLOY

By /s/ Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

NYSE'S SECOND SUPPLEMENTAL REQUEST TO CHARGE

[DOC. 189]

[CAPTION]

71 Civ. 460 R.O.
71 Civ. 1940 R.O.

Defendant New York Stock Exchange, Inc. hereby additionally requests the Court to charge the jury as follows:

32(b). There has been a good deal of testimony about the subject of a knowledgeability letter which, commencing on May 21, 1969, was required to be obtained by McDonnell & Co. from new capital contributors or capital contributors renewing their investment. No rule of the Exchange or principle of law required the Exchange to request such a letter from McDonnell & Co. You should not consider that the failure to obtain such a letter from the plaintiffs in any way constituted a breach of duty by the Exchange. The evidence shows that such letters were simply a means through which the Exchange sought to preclude future claims being made againt the Exchange.

32(c). There has also been a good deal of testimony about the Exchange's net capital rule, Rule 325. That rule was the applicable rule governing the net capital which member firms were required to

maintain. Generally the statutory scheme provided that net capital must be maintained in a ratio of 2000%. Congress left to the SEC the power to provide in detail exactly what that meant. The SEC's capital rule exempted all Exchange member firms from the application of the SEC capital rule because the Exchange's rule was more comprehensive than the SEC's rule. Thus, the governing capital rule for Exchange member firms at all times was Exchange Rule 325. That rule, by its words, provided that the Exchange could make an exception for any particular member firm or could require any particular member firm to have a lower capital ratio. Furthermore, the Exchange's net capital rule did not provide for any penalty for its breach.

Securities Exchange Act, Section 8(b); SEC Rule 15c3-1(b)(2), 17 C.F.R. § 240. 15c3-1(b)(2); NYSE Rule 325 (Trial Exhibit 34).

35(a). The New York Stock Exchange Special Trust Fund was established by the Exchange in 1964. Commitment of the funds of the Trust in each particular instance rests in the sole and absolute discretion of the Trustees. The funds may be used only to assist public customers of a distressed member firm. No person could have a claim against the Trust for its

failure to assist such person. No rule of the Exchange nor principle of law required the establishment of the Special Trust Fund or commitment of its funds to assist any public customers of any member firms.

Antonucci v. Robinson, 317 F.Supp. 668 (S.D.N.Y. 1970)
Goldberg v. First Devonshire Corporation 320 F.Supp. 780 (S.D.N.Y. 1970).

Dated: New York, New York
May 14, 1975

MILBANK, TWEED, HADLEY & McCLOY

By /s/ Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

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NYSE'S THIRD SUPPLEMENTAL REQUEST TO CHARGE

[Doc. 190]

[CAPTION]

71 Civ. 460 R.O.
71 Civ. 1940 R.O.

Defendant New York Stock Exchange, Inc. hereby additionally requests the Court to charge the jury as follows:

34(a). In evaluating the evidence on regulation, you must also consider the qualify of the evidence. By that I mean that documents prepared at the time of a transaction to evidence the transaction are better evidence than documents prepared much later, such as Mr. Haack's bulletin to the Exchange membership which is Exhibit 86 and Murray McDonnell's letter to the Exchange which is Exhibit WWW. Such later-prepared documents are simply someone else's conclusion about the prior evidence. You should scrutinize the contemporaneous evidence to form your own conclusions, although you may consider such subsequently prepared documents which are in evidence for whatever assistance you may think such documents afford in evaluating the contemporaneous evidence.

Dated: New York, New York
May 19, 1975

NYSE'S THIRD SUPPLEMENTAL REQUEST TO CHARGE

MILBANK, TWEED, HADLEY & McCLOY

By /s/Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for Defendant
New York Stock Exchange, Inc.

NYSE'S FOURTH SUPPLEMENTAL REQUEST TO CHARGE

[Doc. 209]

[CAPTION]	71 Civ. 460 R.O. 71 Civ. 1940 R.O.

Defendant New York Stock Exchange, Inc. hereby additionally requests the Court to charge the jury as follows:

35(a). You have heard testimony and argument concerning two separate provisions in the subordination agreements that were signed by Mrs. Anna McDonnell and Mrs. Murphy. One provision provides for termination of the agreement (¶ 7, p. 12) on 100 days' notice (as defined by ¶ 1(a)) at the election of the lender. A separate provision provides for withdrawal of securities (¶ 7, p. 10) during the term of the agreements. Securities may be withdrawn under the latter provision if after withdrawal the aggregate indebtedness of the firm would not exceed 1500% of its net capital. However, the lender's right to give 100 days' notice to terminate the agreement was absolute and in no way restricted by the 1500% limitation on the right to withdraw securities. In this case, you may consider the fact

neither Mrs. Anna McDonnell nor Mrs. Murphy gave notice to terminate their respective agreement after they concededly learned that McDonnell & Co. was in poor condition as evidence that the proximate cause of the loss of these plaintiffs' investment was their own choice to remain as capital contributors despite the known risk.

38(a). In fulfilling its regulatory duties with regard to investments by trusts in member organizations, the sole practice of the Exchange was to ascertain whether the particular investment was the type of investment authorized by the trust instrument. The Will of James F. McDonnell, Sr. permitted the trustees to invest in subordinated debentures of McDonnell & Co., such as the Series B Debenture and the Series E Debenture, and there is no issue before you on the authority of the trustees to make that type of investment.

Dated: New York, New York
May 21, 1975

MILBANK, TWEED, HADLEY &
McCLOY

By /s/Russell E. Brooks
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
Attorneys for defendant
New York Stock Exchange, Inc.

A-211(1)*

TRANSCRIPT OF TRIAL

[Docs. 147, 148, 149, 201]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CAPTION

71 Civ. 461
71 Civ. 1940

April 28, 1975,
10 A.M.

Before:

Hon. Richard Owen,
District Judge and a Jury.

Appearances:

DAVIS & COX, ESQS.
Attorneys for Plaintiffs,
By: Walter H. Beebe, Esq.,
David S. Dubin, Esq.,
Marc J. Adelsohn, Esq.

PROSKAUER ROSE GOETZ & MENDELSOHN, ESQS.,
Attorneys for receiver for defendant
McDonnell & Co.,
By: Steven J. Stein, Esq.

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* The complete 2,725-page transcript of the trial proceedings before the District Court are reproduced hereinafter without renumbering. References to the transcript in the list of contents are made as follows: A-211( ).

Appearances:

MILBANK TWEED HADLEY & McCLOY, ESQS.,
Attorneys for defendant New York Stock Exchange,
By: Russell E. Brooks, Esq.,
Mrs. Toni C. Lichstein.

LORD DAY & LORD, ESQS.,
Attorneys for American Stock Exchange
By: John J. Loflin, Esq.,
Scott Greathead, Esq.

1:45 P.M.

(A jury of six and two alternates were impaneled and sworn.)

THE COURT: Mr. Beebe.

MR. BEEBE: Your Honor, ladies and gentlemen, my name is Walter Beebe, I represent the plaintiffs. As Judge Owen told you, my role at this point is to give you a road map of what the plaintiffs are going to prove before you.

I would like to remind you that what I say is not in evidence and the witnesses and the documents will give you the evidence.

This case is about stock exchanges and how they operate, and about three individual investors and what happened to them. It is also about equal enforcement of the rules, and it is about honesty and fair dealing, and their opposite, which is fraud.

As the testimony is presented you will hear a good deal about disclosure and the requirement for disclosure when people sell securities.

The opposite of disclosure is withholding information. It's like a man who is courting a woman and he doesn't tell her that he is already married. That's nondisclosure. And that is one of the issues you will be asked to decide, did The New York Stock Exchange and The

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American Stock Exchange, McDonnell & Company, hold back important information from the plaintiffs.

As the evidence develops you will learn the investors are Mrs. Anna McDonnell, who is an 81-year old widow, and Mrs. Margaret Mary Murphy, James McDonnell, Jr., and a trust left under the will of the deceased Mr. McDonnell.

The other participants are The New York Stock Exchange and The American Stock Exchange and the stock brokerage company founded by the deceased, Mr. McDonnell. It is named McDonnell & Company, and that company was run by one of the McDonnell sons, T. Murray McDonnell.

I don't know how much each of you on the jury may know about the role of stock exchanges. You will hear and may read in some of the exhibits a good deal about stock exchanges during this trial. You will learn that stockbrokers buy and sell stocks and bonds and other securities both for themselves and for customers.

A stock exchange is simply a group of these brokers and their companies who have joined together to do this buying and selling in one place. They form the membership of the stock exchange. It is a convenient way to do business and to make money.

The evidence at this trial will show that as a result in part of the 1929 stock market crash Congress

passed laws which require the exchanges to adopt and enforce specific rules. These rules cover orderly training, disciplining of members and suspending, or expelling members whose finances or operations fall below certain safety levels.

McDonnell & Company was a member of both The New York Stock Exchange and The American Stock Exchange.

Now, the main events in this case took place in 1967, 1968, 1969 and into 1970, too.

As the true unfolds you will learn that starting in 1967 McDonnell & Company was in serious trouble and it went downhill from there. Its operations and finances were collapsing throughout 1968. It attempted to convert to computers for its record keeping, and it failed. It began losing money even though the volume of business increas

Key executives died or left. By late 1968 it was in violation of these rules I told you about. The most important rule which Congress passed is called the net capital rule. You will hear a lot about that. Briefly that rule says that a brokerage firm is allowed to go into debt, but there is a limit. Beyond that limit is just not safe.

You may not believe this, but the limit is 2,000 per cent of the brokerage firm's assets. Let me give you

an example to show you what that means in terms of perhaps yourselves. If you owned a house and a car and some life insurance and all your assets together were worth say as much as $50,000, under that rule if you were a brokerage house you were allowed within the safety limits to borrow a million dollars and you were still considered safe as long as you stayed below that limit, which is the very outer limit.

You will see as the facts emerge that the exchanges secretly stretched and finally ignored those strict limits as far as McDonnell & Company was concerned in the Alice in Wonderland world that will unfold before you here.

Now, the company in this state of affairs in late 1968, and early 1969, the plaintiffs, our clients, were asked to invest in it, to give their money to the company. They weren't told about the condition of the company, about the terrible decline in operations, nor about the violations. They were in a word the pigeons that the defendants reached out for and reached for their money.

mdrl

You will hear about a meeting at the New York Stock Exchange. You will learn that during the course of that meeting the exchange issued an order. It ordered McDonnell & Company to go out and raise money. It didn't care how or where. And it had to be done so quickly that no investigation was possible.

It gave the order. McDonnell & Company got the money. And a large chunk of that money came from our clients.

The real culprit, we believe, is the exchange, for what they did. On January 29, 1969, a day or so, or perhaps the same day of that meeting, the president of McDonnell & Company, Murray McDonnell, called his trusting mother on the telephone, could he borrow her stocks for a little while. "Of course," she said. It was as simple as that.

Then he called Marjory, and asked to borrow her stocks. He would have one of his subordinates, Rick Olney, call to arrange the details. Marjory was a little less gullible than Mrs. McDonnell, but still very naive. She asked only if there were any risks. "Nothing to worry about," he said.

So she went along, too.

This is not the kind of searching inquiry that

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you would expect sophisticated investors to make before a decision to do something as serious and important as that investment, but these two ladies were not sophisticated investors. They didn't have the benefit of the information about the company as to that its state of affairs was.

Here there wasn't full disclosure. In fact, there wasn't any disclosure about these facts. In fact, there was a conspiracy of silence.

There was also a transaction late in 1968, and another one in April, 1969, also getting money from our clients. Altogether, McDonnell & Company received approximately $2 million in our clients' money.

It was that much less that the Exchanges and McDonnell & Company would have to pay when McDonnell & Company went out of business. They benefited at the expense of our clients.

The Exchanges continued to cover up the terrible condition at McDonnell & Company for a while after that series of events in early 1969, but they couldn't hide it forever. There was pressure from the newspapers and Washington.

Throughout the summer of 1969 they did keep the secret, at least the degree of how bad things were,

by bending the rules. And it may have been worse than just bending the rules, as you will see.

By the fall of 1969, the stock exchange stepped in and forced McDonnell and Company to restructure its whole financial situation, and the plaintiffs, our clients, were forced to sell their securities and accept, in effect, IOU's, pieces of paper.

By early 1970, too many people knew the truth and it finally came out, the disaster was exposed, and McDonnell & Company was put out of existence.

The plaintiffs in a little more than one year had lost everything.

Coming back to the first thing I said, this is a case about failure to play by the rules and failure to tell the truth.

Let me just talk about the second part of that for a moment.

The basic requirement in securities law, which Judge Owen will explain to you in more detail as we go along, is full disclosure to people who are buying securities, particularly they must be told if there is anything important that is wrong with the company.

In other words, in my example a man has to tell the woman if he is married. It is only fair. The

plaintiffs didn't know about the business condition of McDonnell & Company. They were not officers or directors or even employees at the time when they were asked to put up their money.

The widow, Anna McDonnell, was 75 years old at the time. Jim was an automobile dealer, a business man in Detroit. Marjorie was a housewife, the mother of five children. They knew nothing about what was really going on at McDonnell & Company at that time, and nobody let out the secret because they wanted their money.

One argument that the Exchanges apparently will make is that the Exchanges were innocent bystanders, they didn't know anything dishonest or unfair was going on. The plaintiffs will rely on events to show just the opposite was true, that the Exchanges were far from innocent bystanders, that the New York Stock Exchange actively participated in this scheme, and that the American Stock Exchange closed its eyes to what was happening, even after it knew what was going on.

I will pause with the American Stock Exchange for a moment because it played a very, very, very inactive role, claiming it was entitled to delegate everything to the New York Stock Exchange and it didn't have any duties to see if anything was wrong. It's one

thing to delegate, but it's quite another thing after the wrongdoing is brought to your attention to ignore it and do nothing about it, especially when the New York Stock Exchange was not doing anything about it, and, worse, was using the information they had to obtain money from people who didn't know what was the truth at the company.

The New York Stock Exchange issued the orders. It's responsible for what the people under its control did. In other words, as Harry Truman said, "The buck stops there."

The Exchanges also, I think you will hear a lot of argument along the line that there is a family connection between the plaintiffs and McDonnell & Company. That should be no excuse for frauds that were committed. The plaintiffs themselves didn't know anything about the securities business. They weren't told about the recent awful developments. And there is nothing in the securities laws, as Judge Owen will tell you, I am sure, which says that they are entitled to less protection from the Exchanges than anyone else.

This case shouldn't be decided on whether a mother was gullible or a brother didn't ask the right questions, or a sister was naive.

So this is a case about honesty and fair dealing, even-handed treatment, and full disclosure of the facts. It will be for you to decide within the law as Judge Owen gives it to you whether or not the Exchanges and McDonnell & Company are responsible for what they did and didn't do.

I have told you what we intend to prove. Let me take a brief minute to tell you how we intend to go about proving it.

First, Mrs. Margaret Mary Murphy will testify. Then we will offer and read to you parts of the testimony taken of Mrs. Anna McDonnell two years ago at her home. Then James McDonnell will tell you what he knows.

After that, we will call witnesses who are present, and former employees of the Exchanges, and elsewhere, to show what they knew and what they did, and how the securities industry works and what informtion was withheld.

Thank you.

MR. STEIN: Ladies and gentlemen, my name is Steven Stein. I am here to speak for what's left of McDonnell & Company, which is a receivership under the supervision of the Delaware Court of Chancery.

My client is not McDonnell & Company. My

client is a man by the name of Bruce Stargatt, who some four years ago was appointed by the Chancellor of the Delaware Court to undertake an orderly liquidation of the company's business.

His job, after he was appointed, was to go out and collect all the assets, whatever was left, so that the claims of the legitimate creditors could be satisfied.

When a company goes out of business it's a very, very serious event for many people who go way beyond the company. Ordinarily, a company has space in an office building. The landlord is left holding the bag because payments of rent are not being paid. There are all kinds of people that are hurt by an event such as this, and it's truly tragic. I know landlords don't evoke a great amount of sympathy, but there are people who print up brochures and circulars, people who furnish pencils and other mundane items, a whole series of people are hurt when a company goes out of business. These people have legal rights that must not be trampled upon. Someone has got to be put in the position of making sure that these legitimate creditors of the company are taken care of. That is what a receiver does.

I am sure many of you in these troubled times have heard of a bankruptcy trustee. A receiver is

really the same as a bankruptcy trustee, only a receiver reports to a state court. A bankruptcy trustee reports to a federal court. The jobs and the duties and the obligations of a receiver are almost entirely parallel to a bankruptcy trustee. I am speaking for this receiver and bankruptcy trustee.

When the receivership proceeding began after this debacle at McDonnell & Company procedures had to be established for the filing and processing of claims. Claims started to come in. There were certain claims that were made of this company that were brought to Mr. Stargatt's attention that were obviously perfectly legitimate claims.

There were other claims that were made that Mr. Stargatt, after considering the records of the company, and the equities of the claim, and balancing one against the other, had to make certain decisions. He had to decide in the very first instant whether or not, as a trustee, being specified by the Delaware Chancellor, should he pay claimant A, should he pay claimant B, should he pay claimant C?

Mr. Stargattis compensated by the Delaware Court. Mr. Stargatthas no axe to grind in this case or any other case that is brought against McDonnell & Company.

His duties are to bring honor upon himself, and to report to the Delaware court, and to make sure that his job is done.

Now, the story of this particular case starts many, many years ago, way before the Delaware court was involved, and probably at around the time or maybe even before Bruce Stargatt was born. It really goes back to around the First World War, when a man named James Francis McDonnell, Sr., organized a company which came to be known as McDonnell.

At about the time Mr. McDonnell formed this company he married a lady by the name of Anna Murray. Mrs. Murray was the daughter of one of the co-founders of Consolidated Edison.

During the 20's, the 30's, the 40's and into the 50's, McDonnell & Company prospered. The McDonnell family prospered in a parallel fashion. There were 14 children of the marriage. Six sons and eight daughters. Of the six sons at one time or another all had some kind of a connection with the business.

This was a family business. It was started by Mr. McDonnell, Sr., and it provided the basis of one of the great fortunes in America.

In 1958, the first of a series of misfortunes

struck the McDonnell family. James Francis McDonnell, Sr. died at the age of 79. At that time the new head of the company became one of the sons, T. Murray McDonnell, whom Mr. Beebe mentioned in his opening statement, and he began to run the company.

What Mr. McDonnell, Sr. did, in his will, in his plan for how his great fortune should be distributed among his children, is really a very important part of this case, because Mr. McDonnell left a will which gave to his executors and trustees completely unfettered discretion in giving money as long as that money went into the business.

He also gave his executors and trustees the right to leave all of his great considerable wealth in the company, because this was a family business, which is not an extraordinary type of a testamentary scheme.

Murray became the chief executive officer in 1958, and this was a great period of expansion for the company. By the early and mid 60's the company had 26 offices, one in Paris, three in New York, and the rest scattered all over the United States. However, in the early 60's the company began to come on somewhat troubled times.

Mrs. Anna Murray McDonnell, who is a plaintiff

in this case, was called upon for the first time to lend some of her own money to the company. She knew she was accepting risks. However, she was later to say in explaining that she loaned $1.8 million that she gave the money when Murray came and asked for it because, and this was her sworn testimony, "Any child had what they wanted if I could give it to them, help them out."

A very commendable reaction on the part of a mother.

Also, in the mid 1960's Anne McDonnell Ford, married to Henry Ford, was called upon to give some of her millions to the company to help finance this expansion, and she came up --

MR. BEEBE: Excuse me, I have an objection to the introductory remarks going far beyond anything that is relevant or plausibly admissible at the trial.

THE COURT: That is hard to tell at this point. I think perhaps it's more in the nature of summation in terms of the quality of the language but it seems to me that the fact that are to be proved in the case ought to be before the jury, if counsel wishes.

MR. BEEBE: I feel we are getting into an area past it, that these facts will never come before the jury.

THE COURT: That I am unable to rule upon, at this point. I would suggest counsel confine himself to what he expects to prove. To that extent the objection is overruled. Go ahead.

MR. STEIN: May I proceed, your Honor?

THE COURT: You may.

MR. STEIN: Another one of the plaintiffs in this case is Margaret McDonnell Murphy, was also asked to make a certain loan to McDonnell, and as a loyal family member she did so.

By the late 60's the company, the fortunes of the company, began to turn downward in certain ways. Like many other Wall Street brokerage firms, there were record keeping problems. The stock exchange in its role as regulator and supervisor of member companies had to impose certain restrictions on McDonnell. There were other tragedies that befell the McDonnell family. One of their sons, Sean, died at a very early age, suddenly and unexpected. A man named Thomas McKay, who is a very important figure in the company, died during the 1960s.

So, as the fortunes of the company turned downward nobody really new except perhaps some of the people in the family, maybe it was a lack of management, maybe it was the record keeping problem that was so much of

a problemon Wall Street generally, but it's clear that as 1968 drew to a close McDonnell, like other companies, had its share of problems.

In early 1969, the evidence will show that Anna McDonnell, the matriarch of the family, was again called upon to help out in the family business, and at that time at the request of her own son Murray invested the sum of $1.4 million in the company.

One of the other plaintiffs, Margaret McDonnell Murphy, was asked to invest a substantial sum of money, and she gave approximately $342,000 to the company by way of loaning her securities.

It's claimed here these layal family members were defrauded out of their money, that they didn't know what was going on.

Ladies and gentlemen, you have to bear in mind that you are talking about the McDonnells here and McDonnells there, and you have got to look at the witnesses and look at the proofs in this case and you have got to decide just how much Mrs. McDonnell and Mr. McDonnell and Mrs. Murphy actually knew aboutthe business. You have got to understand the kind of family the McDonnells were and are.

James McDonnell, who is not in the business,

who is also a plaintiff in this case, in his way came to the aid of the family also, perhaps in an even more significant way, and quite commendably. When the fortunes of the company had gone into a tailspin, another pair of hands was needed and James became the manager of the Detroit office. During the summer of 1969, the evidence will show that James flew all over the country trying to find additional investors in this company.

At this time we have three McDonnells, members of the second generation of McDonnells, Murray McDonnell, Morgan McDonnell and James McDonnell. That was McDonnell & Company in 1969, when things were going downhill.

You will hear about a series B debenture during the course of this trial. A debenture is a bond, it's a contract between a company and the holder, and it provides that under certain circumstances the holder, after a certain period of time, will get money. It's a loan with a fair amount of window dressing.

A contention has been made that when the money was due on one of these loans to the estate of Mr. McDonnell, Sr., that thatmoney instead of being paid, the terms of the contract, the bond, were changed without the knowledge of the second generation of McDonnells, and that this

was a fraud on them.

So that the theme, and the way you have to perceive all of the evidence in this case, is how much did the McDonnells know about what was happening to the family business, how much did they know and when did they know it. Bear those questions in mind.

Be very, very skeptical about what you hear from the witnesses who are going to sit in the witness stand. Remember that each of the witnesses who claim they were defrauded comprise members of the immediate McDonnell family.

Remember, also, that there is no McDonnell & Company at this point, and that to the extent that you find that any members of the family are entitled to be paid the net effect of that is that other creditors not family members may suffer because there is no McDonnell & Company.

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MR. BROOKS: Ladies and gentlemen of the jury, my name is Russell Brooks. I am with the law firm of Milbank Tweed Hadley & McCloy who represent the defendant, The New York Stock Exchange. Assisting me in this trial is Miss Toni Lichstein who is sitting right here at my right (indicating). Also assisting me is Miss Joann Solomon. Miss Solomon is a para-legal and not a lawyer, that is why she is not sitting at counsel's table. Para-legals help lawyers like para-medics help doctors.

I think we will have some problem if we don't keep in mind that there are two stock exchanges involved in this case as defendants. The New York Stock Exchange and The American Stock Exchange. We have in the course of representing the stock exchange and in referring occasionally to both exchanges, called The New York Stock Exchange "the exchange." And we have called The American Stock Exchange "the Amex."

Now, if my colleague, Mr. Loflin, is not disagreeable I will refer to The New York Stock Exchange, my client, as the exchange, and the American Exchange as the Amex.

You have probably all heard of both stock exchanges, but I am sure you have a question, as most people do, what is a stock exchange really. We all know that it is

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talked about in the newscast every night as the stock prices are given for trading both on The New York Stock Exchange and The American Stock Exchange. We will present evidence to show you what a stock exchange really is, who it is, what its job is, what its duties are.

There will be quite a good deal of evidence on that so that we hope by the end of this case there will be no doubt about what it is, what it is required to do, and what it is not required to do.

I think for present purposes if you were to analogize it to a trade association or a union which has some characteristics of a governmental agency, it has rules, it has officers and it serves an important function in our economy by providing a facility where stocks and bonds can be traded and through which capital can be raised for American business, you cannot go too far wrong.

What we will introduce and what the evidence will show to you is that the stock exchange is not an insurance company to insure people who loan money at the request of their relatives and then, unfortunately, we all agreed unfortunately, lose that money. The stock exchange is not here to insure those investments.

Now, I think it is important that you keep in mind the cast in this saga. Mr. Stein has told you of Anna

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McDonnell who is the matriarch of this family and wife of James Francis McDonnell, the founder of this once marvelous firm. Now, running this firm during the term, or the time in question and at various times was her son, Charles, to whom she loaned money so he could put it into the firm, her son Murray, who asked her for money for the firm which she gave willingly. Her son Morgan, who was a vice president of the firm, and a member of the exchange who sat on the floor of the exchange trading those stocks and bonds for the benefit of McDonnell & Company; and her son Sean who was until 1968, the back office whiz of McDonnell & Company, and a very important person who dealt with the problems which mushroomed, unfortunately, after Sean's untimely death.

Now, investing in this firm at the relevant times are many other non-participating members in the business of McDonnell. You will find Anne McDonnell Ford who later remarried to a man named Johnson. You will find after Sean's death the estate of Sean McDonnell. You will find Murray McDonnell owning approximately 37 per cent of the firm, and Morgan McDonnell owning about 12 per cent of the firm.

You will find Murray McDonnell's wife contributing millions in capital to the firm. So that these plaintiffs are not unusual. They are not but a small part of this family operation which was run and which was financed by

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the family.

Morgan was asked to make a loan by Murray. That was not unusual, and Murray was not the only brother to ask Morgan to make a loan to support the firm. A few years earlier Sean had done so.

James once worked with the firm, in 1945. He left and went to Detroit. Subsequently, in the spring of 1969, his brother Morgan asked him to help out, take over the Detroit office. To do that James had to buy a few nominal shares of stock in the company amounting to about $20,000.

James did this at the request of his brother, Morgan. To help out the family firm, by stepping in and running the Detroit office while James' business interests were well taken care of by others.

Now, the plaintiffs are contending two things: They first say that when they contributed their funds to McDonnell & Co. the officers of McDonnell & Co. who were plaintiffs' relatives, Murray, Morgan, didn't tell them all there was to know about the family firm.

Now, plaintiffs say that if they didn't tell them all there was to know about the family firm in those family conversations, we don't concede that they did not tell them all their was to know, but they say if they didn't tell them

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all there was to know, that's the stock exchange's fault. The stock exchange down here on 11 Wall Street. It's their fault. The plaintiffs would like their money back. They would like it back from whoever has got money to give it back. And that is the stock exchange. It can't give you back the money, but we don't think they will show that they are entitled to the money from the stock exchange.

You will see from the evidence that recovery from the New York Stock Exchange would simply be unjust and contrary to the law which his Honor will instruct you on at the close of the evidence. Simple matter is the exchange had no communication with these plaintiffs in connection with their transactions through the firm of McDonnell & Company and was not required to do so.

Now, it's pretty hard to mislead that sweetheart that Mr. Beebe told you about that you're planning to marry if she is not your fiancee and if you don't talk to her and if you are not married at all. And that's the position of a stock exchange. We don't know the girl.

Now, plaintiffs' second contention is that the exchange should have regulated McDonnell & Co. differently than the exchange did regulate McDonnell & Co. Now, they don't claim that the exchange didn't regulate McDonnell & Company. They can't do that, because as you will see from

the evidence the stock exchange was all over this firm trying to get it to pull up its socks. They were writing letters and memos almost every day in an effort to help this member firm make a go of a difficult time.

Now, as you consider this evidence on the regulatory aspect of the case I ask you to put your feet in the shoes of the men who had the responsibility, the important responsibility for making these regulatory decisions in the public interest. I want you to ask yourselves the question, did these men behave properly under the standards that his Honor will advise you of, or did they not? I am confident that you will agree that they did behave properly.

Also keep in mind that this is not a legislative inquiry here. This is a trial to determine if a wrong was done did it hurt these plaintiffs over here?

Even if there is evidence of regulation by the exchange which you might have done in a different way, you still should go further and ask yourself, did that regulation hurt these plaintiffs? It may indeed have helped them. So, ask yourselves that. And, as you are listening to the evidence we think you will agree that the exchange's regulation was proper and in the public interest.

You will see that that money that Mr. Beebe

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told you the stock exchange ordered McDonnel to bring in, which in part was plaintiffs' money as well as Murray McDonnell's money, and as well as his wife's money, was not money for the stock exchange, it was money for McDonnell & Co. So that it could do better, so that it could run itself better.

That money was not particularly a welcome addition to those other member brokerage firms of the exchange, because they had to compete in the market for business with McDonnell & Co. And here the exchange was telling McDonnell & Co. to get more money to make itself compete better.

Make no mistake about who that money was for, where it went and what it was designed to do. It did not go into the pocket of the exchange.

In short, when his Honor has instructed you you will consider the evidence. We think you will find that the plaintiffs' claim that the stock exchange didn't regulate properly and, therefore, injured these plaintiffs simply cannot stand up at all.

Now, it is important as you listen to the evidence to evaluate the motive and the bias of the witnesses who speak. When you evaluate them ask yourself, is the witness saying the same thing today as the witness said back in 1969?

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Pay careful attention to the good faith of the witnesses as they tell you about what they did, why they did it. If you do we think the evidence will show that The New York Stock Exchange has no business in this lawsuit and the simple story to be told here is that the plaintiffs would like to get back their money that they invested. They would like to get it back without suing their relatives from the closest and deepest pocket they can lay their hands on.

MR. LOFLIN: Your Honor, ladies and gentlemen of the jury, I am John Loflin, a member of the firm of Lord Day & Lord. I have assisting me here Mr. Scott Greathead who is at the end of the table. We represent The American Stock Exchange. That is the exchange that has been referred to as previously as the Amex. And it is familiarly known as the Amex, and that will help keep the players straight.

The court properly commented a minute ago that in an opening such as this an attorney should confine his remarks to what he expects to prove. Accepting that admonition I can assure you I will have to sit down very quickly, because I don't expect to prove very much. There are reasons for that. My client, the Amex, is way off on the periphery of this case. True enough McDonnel & Company

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belongs to the Amex, or, belonged to the Amex, and it belonged to the New York Stock Exchange. That's not unusual at all. In fact, it's much more common than otherwise.

As you probably know different stocks are listed on different exchanges. Brokerage firms keep seats on each exchange. This perfectly common practice has led to certain rules adopted by the Amex. These rules are not secret. They are published and widely distributed. Every law firm in the city has copies of them, brokerage firms have copies of them, McDonnell & Company had copies of them. They are readily available.

What do these rules tell us that is helpful in understanding the situation that you are going to learn about as this trial goes on? It has to do with what is practicable, it has to do with what is efficient, it has to do with carrying out the purposes of The Securities and Exchange Act of 1934 and behaving under the supervision as an exchange must of the Securities and Exchange Commission.

Now, more specifically it comes down to this: An exchange has the duty to maintain oversight of the financial condition of its member firms. However, under the rules of The American Stock Exchange where a firm belongs also to The New York Stock Exchange, that function is to be performed, and it is performed by the New York Stock

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Exchange.

Now, this is not a mystery to anyone. New York knows it has that responsibility and it performs it. The Securities Exchange Commission knows it and knows it particularly for a very good reason. Before you can become registered and effective as a securities exchange you must adopt rules satisfactory to the Securities and Exchange Commission.

Our rules set forth very clearly that as far as financial oversight is concerned for a dual member firm, that is a firm belongs to the Amex and the New York Stock Exchange, the financial oversight is going to be the responsibility of New York. That doesn't mean that the Amex delegates this responsibility to New York. We are not converting them into our agency, or our agent. It is just that we are excused from performing the same function all over again that the New York has to perform under its rules.

As I was listening to Mr. Beebe's opening remarks I came to the conclusion that what he is really complaining about is not that the Amex observed its rules as it is required by law to do, he is really complaining that we should have done something other than is in our rules, we should have adopted a rule to protect his plaintiffs.

He has the advantage of hindsight of that and I

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am sure in a minute he could write out a rule which would take care of these plaintiffs, but rules are not written by hindsight, they are written by practical men engaged in the business, and in this instance a regulated business subject to the oversight of the SEC and our rules going to everyone provide that under these circumstances it is the New York Stock Exchange, not the Amex who has the supervisory role.

So, we observe our rules. The reason I said I wouldn't be speaking here very long is because under our rules we had no function to perform. And I would like for you to listen, as I am sure you will, I will be listening, too, as these various witnesses take the stand. You are not going to hear anybody take the stand and describe, well, we sat down with representatives of the Amex and they told us this, or they told us that. That didn't happen.

No witness is going to say anything about any meetings with Amex. They are not going to say we advised them to invest with McDonnell & Company or not to advise with McDonnell & Company.

Mr. Beebe made a reference to what he considers a significant meeting at the New York Stock Exchange, obviously with reference to representatives of McDonnell & Company. We weren't there. We had no role to play.

We certainly don't know what Murray McDonnell, the chief executive officer of the company, told his mother, his brother, his sister, or anyone else. He didn't consult with us in the situation, he didn't invite us in, and didn't ask us if this is all right, nor did we say that it is all right. It's not likely we would know anything about what was going on in the family.

It seems there was a conversation between the brother, the mother and the sister, and as a result of those conversations they made an investment on which they lost, there is no question about it.

I suggest to you as you hear this testimony from these various witnesses, the people who invested and lost, the people who describe the function of the exchanges, ask yourself, that no matter how bad or how

regrettable the situation might be, do you really want to say it was the responsibility of the American Stock Exchange which played no role in this from beginning to end.

That is our position, that we weren't required to play any role, and we didn't keep that plan a secret to ourselves. Anyone who takes the trouble to become informed -- and believe me when people are investing large sums of money you can be sure either they or their advisors or someone does a little investigating -- they would have known that the Amex was not in this picture and was not going to be in the picture, and that is exactly what happened. There were no surprises, no disappointments. No one was relying on the Amex to take a role, it didn't take a role.

With facts like these, we just don't see there is nay legal liability that can emerge. The American Stock Exchange we believe inthe end should be dismissed in this action.

Thank you very much.

THE COURT: Will you call your first witness.

MR. BEEBE: Mrs. Murphy.

M A R G A R E T M A R Y M C D O N N E L L M U R P H Y, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BEEBE:

Q Mrs. Murphy, are you married?

A I am.

Q Do you have any children?

A I do. I have six children, two boys and four girls.

Q Do you work?

A I do not. I am a housewife.

Q Have you ever held any employment, any job?

A I did. I worked before I was married for six months as a receptionist in a modern furniture showroom.

Q Since you are married you haven't held any employment?

A No, I have not worked since I have been married.

Q In 1968, what did your husband do?

A In 1968, my husband was an automobile dealer in Far Hills, in Bernardsville, New Jersey.

Q Where do you live?

A I live in Lamberton Road, Far Hills, New Jersey.

Q Did you live there then?

A We lived there then, that's right.

Q Did there come a time in 1969 when you were approached about lending money to McDonnell & Company?

A Yes, I was approached in the latter part of January of 1969.

Q And who approached you?

A At first I was approached by my brother Murray, who called and said they would like to borrow my account for a short periof of time for an underwriting,and that in the afternoon, later in that day, a gentleman called Mr. Rick O' ay would call me to explain the details of that loan.

Q Did you ask your brother Murray when he called any questions about what he was asking you to do?

A No. That was justthe whole extent of our conversation.

Q And what was Murray McDonnell's position at that time?

A Murray McDonnellwas head of the firm at that time.

Q Did Rick Olney call you later that afternoon?

A Yes, later that afternoon Rick Olney did call me.

Q What did he say to you?

A He repeated what Murray had said initially, that they would like to borrow my account for a very short period of time for an underwriting. And I asked Rick Olney whether there were any risks that I was taking, and he guaranteed me that there were no risks, that they owned two seats on the floor of the New York Stock Exchange, they had a very valuable collection of paintings in the office, and furniture, and all of this could be sold to pay me back.

And I said, "Rick, you promise me there are no risks?" And he said "I promise you, there is no way you can lose your money."

Q Mr. Loflin just said that when people invest large sums of money they make sure that either they or their advisors check things out a little bit before they do that.

Did you consult any advisors at that point?

MR. LOFLIN: Objection to the form of the question.

THE COURT: Sustained.

Q After Mr. Olney spoke to you, did you consult with anyone about this request?

A No, I didn't consult with anybody. I took what was told to me to be the truth.

MR. STEIN: I move the last sentence be stricken as not responsive to the question.

THE COURT: Strike it.

Q Did you talk with Mr. Olney any further about how this transaction was to take place?

A Mr. Olney --

MR. STEIN: I object to counsel leading the witness.

THE COURT: Yes. Why don't you just ask her what each said to the other until you have exhausted the conversation.

Q Was there anything further said in the conversation?

A Either Mr. Olney told me that day or the next day that a chauffeur would -- there were certain papers that I would have to sign and a chauffeur would come to my house early the following morning for me to sign some papers for them, and that was the extent of my conversation with Mr. Olney, whether it be one or two conversations at that time.

Q The next morning, or the morning subsequent to that, did the chauffeur indeed come?

A Yes, about 6:30 in the morning Mr. Murray McDonnell's chauffeur came to my house with some papers for me to sign.

MR. BEEBE: I would like to mark this as the first exhibit for identification.

(Plaintiffs' Exhibit 1 was marked for identification)

Q Do you recognize the document that I have just had marked as Plaintiffs' Exhibit 1 for identification?

A Yes, I do recognize the document.

Q Could you turn to the last page, and I ask you if that is your signature that appears on that copy.

A That is my signature.

Q Was this one of the documents you signed when the chauffeur came?

A I believe it was.

MR. BEEBE: I offer that as Plaintiffs' Exhibit 1.

MR. STEIN: No objection.

MR. LOFLIN: No objection.

MR. BROOKS: No objection.

(Plaintiffs' Exhibit 1 was received in evidence.)

Q Now, Mrs. Murphy, when the chauffeur came that morning at 6:30, did he tell you anything about what was in this document?

MR. STEIN: Objection to the question as leading.

THE COURT: Overruled. Go ahead. It's well taken, but overruled. Go ahead. Did he say anything?

A No, he didn't say anything. He just handed me the papers, and there was more than just this, and asked me to sign them.

Q I know thereis more, I am just starting with that one.

Did anyone from McDonnell & Company, apart from what you have already testified to, call you about these papers or explain to you what was in them?

A No.

THE COURT: This is aside from Mr. Olney the day before?

MR. BEEBE: Yes, sir.

A No, nobody told me what the documents were or

anything about them other than that they would arrive at my house and I should please sign them and give them right to the chauffeur.

Q Did you read them before you signed them?

A No, I didn't read them.

Q Did anyone from the stock exchange, the New York Stock Exchange or the American Stock Exchange, get in touch with you before you signed these?

A No, they didn't.

Q This says that it's an application for allied membership or non membership in connection with a subordinated loan.

Did you understand what the purpose of these were?

MR. BROOKS: I object to counsel's characterization of the document. I happen not to agree with it, and it speaks for itself.

THE COURT: I will sustain the objection.

Q What were you signing?

A I didn't know what I was signing.

MR. BEEBE: I would like to have this marked as Plaintiffs' Exhibit 2.

(Plaintiffs' Exhibit 2 was marked for identification)

Q Did you understand that what you were signing was in connection with the loan that Mr. McDonnell had called you about?

A Yes, I knew the papers I was signing were about loaning my money. I dind't understand anything much more about the papers. It was very early in the morning, no one had explained to me what these papers were, and what was the consequences of these papers.

Q The document I have just put in front of you, which is No. 2 for identification, could you turn to the second page, please, and I ask you: Is that your signature?

A That is my signature.

MR. BEEBE: I offer that as Plaintiff's 2.

MR. LOFLIN: No objection.

MR. BROOKS: No objection.

MR. STEIN: No objection.

(Plaintiffs' Exhibit 2 was received in evidence)

Q Did you sign Plaintiffs' 2 at the same time?

A I believe I did.

Q How did you know where to sign these documents?

A I believe there was an X where I was to apply my signature.

(Plaintiffs' Exhibit 3 was marked for identification)

Q With regard to Plaintiffs' 3, Mrs. Murphy, did you also sign that on that morning? I direct your attention to page 15.

A That is my signature.

Q That is entitled a subordination agreement?

A Right.

Q Did you read that before you signed it?

A No, I didn't read it.

MR. BEEBE: I offer that as Plaintiffs' Exhibit 3.

MR. LOFLIN: No objection.

MR. BROOKS: No objection.

MR. STEIN: No objection.

(Plaintiffs' Exhibit 3 was received in evidence)

Q On the next page after the one I directed your attention to, there is a notarial seal, a notarizing signature, anyhow, and stamp. Incidentally, the name is Jane Foley. It says "On the 4th day of February, 1969, before me personally came Margaret Mary McDonnell Murphy,

to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same."

Did you appear before Jane Foley and do what it says in there?

A No, I did not appear before Jane Foley.

Q Do you know who Jane Foley is?

A Jane Foley, I believe, was Mr. Murray McDonnell's secretary.

Q Where was she located? Where did she work?

A In Mr. McDonnell's office in New York.

Q Did you go into New York at some time during that period, go down to Mr. McDonnell's office?

A No, I didn't go down there.

Q The next page, if you will, also contains your signature. It contains a signature. Is that your signature?

A That is my signature.

Q And the following page --

MR. BROOKS: Your Honor, I object. There are two signatures on that page. Could we be more precise in the question and the answer?

MR. BEEBE: I am on the page that at the top has the number 01943.

THE COURT: Where are you now?

MR. BEEBE: I am --

THE COURT: Mr. Brooks, do youhave any real problem with that?

MR. BROOKS: I think the witness could identify which signature she is talking about.

THE WITNESS: I believe I am talking about the one that says Margaret --

THE COURT: I am curious if you had an identification problem.

MR. BROOKS: No. But I would like to have it further clarified.

THE COURT: You better have the witness point out which is her signature.

MR. BEEBE: It may be hard for the jury to follow without a copy.

THE COURT: You better establish that.

Q Which signature is yours, Mrs. Murphy?

A Right above my name that has been typewritten in, Margaret McDonnell Murphy.

Q On the next page, there is apparently a copy of a letter dated February 3, 1969, that says -- addressed to the Division of Finance, Department of Member Firms, New York Stock Exchange. It says "In

connection with the subordinated agreement between McDonnell and Company, Incorporated, and Margaret M. McDonnell Murphy, we certify that the lender is competent to contract and has entered into the agreement of his own free will without duress."

Was this referring to you?

MR. STEIN: I wish to make one point here. I really don't want to burden the record with a lot of objections of a technical nature, but this reading of documents to the jury, now, if Mr. Beebe is willing to accord defense counsel the same liberality in reading from parts of the document I would have no objection if he does it and I would be willing to so stipulate.

THE COURT: I sustain the objection to this question on another ground.

MR. STEIN: That is not what I had in mind.

THE COURT: I appreciate that.

MR.BROOKS: I have a further objection. Counsel's question, I believe, asked Mrs. Murphy whether this letter written by somebody else to somebody else referred to her.

We haven't even established that this letter

was part of what she received, and I think it's improper to ask her who the writer of the letter was intending to refer.

THE COURT: That was the basis on which I sustained the objection.

Q Mrs. Murphy, maybe we can just turn to the next page. This exhibit is in evidence, and I will just ask you about the signature on the next page. Is that your signature? There is only one on that page?

A That is my signature.

Q Were these the only documents you signed that day when the chauffeur came?

A I believe that was all I signed.

Q Had you ever lent money before in connection with the McDonnell & Company brokerage firm?

A Yes. I believe in 1965 I loaned my account, or part of my account, to my brother Sean, who asked me if he could borrow it for an underwriting for, I believe as he stated, it would be just about two months time. And I did loan it to him, and it was returned to me.

Q And how long did it stay under the condition of being a loaned account?

A I believe it was a matter of only a couple of months.

Q Did you receive any payment or interest on account of that loan?

A To the best of my recollection, I did receive a check for $700 when that loan was finished with.

Q Apart from what you were told, did you know in January of 1969 of any problems at McDonnell & Company?

A I knew of no problems at McDonnell & Company. Nobody had told me that therewas anything wrong going on within the firm. I believed what I had been told, that it was in good shape and they just would like to borrow my account.

MR. STEIN: I object.

THE COURT: Sustained. Mrs. Murphy, when you have answered counsel's question, stop. If he has a question he wants to put to you getting on to another area he will put it to you.

Q In any case, you didn't know of any problems?

A No, I didn't.

Q Did there come a time when you learned that there were problems with the firm?

A Yes, in about the spring, early spring, of 1969.

Q How did it come to pass that you learned about the problems?

A The first time I learned anything my sister-in-law, Sean's widow, Sandra McDonnell, called me on thephone and asked me what I knew that she had heard the firm was in trouble, and I told her I knew nothing. And she said she was in New Jersey and was going to stop at our house and see me, which she did.

Q What did she tell youat that time?

A She said she understood that the firm was in very serious financial condition, things were not going well at all, and what d'd I know about it. And I told her that I had not heard anything and had no information for her at all.

Q Did you try and contact the firm at that time?

A Yes, I tried then and many times afterwards to call Mr. Olney, but Mr. Olney most of the times wouldn't answer my calls.

MR. STEIN: I move the last part of the answer be stricken as not responsive.

THE COURT: Yes, strike it out at this time.

Ladies and gentlemen, when I say that something is stricken from the record, I appreciate the fact that you are all human beings and you have heard it. The problem you have to face is that anything you do from this point on you have to treat whatever has been

stricken as if it had never been said. Put it from your mind and disregard it completely. When I say something about striking something from the record it isn't there any more and you are not to consider it in any way.

Go ahead.

Q Mrs. Murphy, during that period did you attempt to withdraw your loan or get your loan paid back?

A No, I didn't.

MR. STEIN: Objection. Counsel is leading the witness.

THE COURT: Overruled. Go ahead. The answer is "no"?

A No, I didn't.

Q Would you explain why -- I am talking about after what Sandra told you -- why you didn't attempt to withdraw your money?

MR. STEIN: I object to the form of the question.

THE COURT: Sustained.

Mr. Beeb e, I think you have to go on, after establishing what she had been told, what she did do or did not do.

Q What was the next even. that occurred in

connection with your loan that comes to your mind?

A The next thing that happened is that I had mad e a pledge to a charitable institution in New Jersey, and I called Mr. Olney on the phone and asked him if he would transfer the funds to this charitable institution, and he said "Yes."

Well -- should I go on?

Q Go ahead.

A Well, shortly, a month or so later, I realized that the funds hadn't been transferred, and I called back to Mr. Olney, and asked him why he didn't -- hadn't -- followed my request, and he said, "Because you have no rights over your account."

Now, I didn't understand this, and that was the first time, which was about early summer of 1969, that I understood that I had no rights left at all. They had never told me that.

Q Did there come a time in September 1969 when the status of your account was changed?

A Yes. In September of 1969 I was invited into New York to meet a gentleman called Paul McDonald, which has a different spelling than ours, who had taken over the running of McDonnell & Company earlier in the summer. I had never met this gentleman, and I went in and

he had tried to explain to us what had been going on, and what he intended to do, and he said the New York Stock Exchange had said that there had to be a change, that my securities would be turned into a -- I would receive a stock certificate; and again I had no choice, I couldn't take my account, I had to go along with this.

MR. STEIN: Your Honor, I object.

THE COURT: Yes. Strike out I had no choice. Mr. McDonald said it was going to be turned into a stock certificate.

THE WITNESS: Yes, part of my account would be turned into a stock certificate.

MR. STEIN: I object on the further ground that it's unresponsive. What Paul McDonald said is clearly hearsay.

THE COURT: Well, this is an operating official of McDonald and Company at that time.

MR. BEEBE: It certainly was an admission.

Q I would like to ask the question again.

Did Paul McDonald say to you in the course of that meeting and that conversation whether or not you had a choice?

A Paul McDonald told me I had no choice.

MR. STEIN: Your Honor, I object again.

THE COURT: Yes. Mr. Baebe, let's get the conversation out before we get into any parts that may have been overheard.

Go ahead. What else was said to you, Mrs. Murphy?

THE WITNESS: That if all of the things that the New York Stock Exchange wanted were done then certain restrictions could be taken away from McDonnell & Company. I believe they weren't allowed to do any advertising at the time, and they were only allowed to sell a certain amount of stock in a day, and I know no other word but "choice" to use, that I had to go along with this, if I ever intended to save anything.

MR. BROOKS: Your Honor, I move to strike the testimony as it is admissible against the New York Stock Exchange as hearsay. I understand it has been admitted against McDonnell & Company, but I object to it being admitted against the New York Stock Exchange.

THE COURT: Yes, there has been no connection at

this point, so I will permit the latter to stand as her state of mind as of that moment.

Go ahead.

MR. BEEBE: I will try to connect it later.

Q Mrs. Murphy, through the clerk I am going to hand you another document here, and I am going to ask you some questions.

(Plaintiffs' Exhibit 4 marked for identification.)

Q I am going to ask you if this document, Exhibit 4 marked for identification, was signed by you on or about that time of your meeting with Mr. McDonald, Paul McDonald.

A This is not my signature here. I had signed an earlier document when I was in his office, but the original document had to be changed and they asked me to come into New York to sign it on about an hour's notice and I couldn't, my husband went over to McDonnell & Company and signed the document for me.

Q Did you authorize him to sign it?

A I authorized him to sign it for me.

MR. BEEBE: May I offer that as Exhibit 4.

THE COURT: Is there any objection?

MR. STEIN: No objection.

MR. BROOKS: No objection.

MR. LOFLIN: No objection, your Honor.

THE COURT: Received.

(Plaintiffs' Exhibit 4 received in evidence.)

BY MR. BEEBE:

Q Just to try and avoid some confusion here, Paul McDonald, the man who you said you went in to see at the company at that time is M-c-D-o-n-a-l-d; is that right?

A That's right.

Q Is he any relation whatsoever?

A No, no relation.

Q Now, I hand you another document which is dated October 15th, 15 days later (handing).

(Plaintiffs' Exhibit 5 marked for identification.)

Q I ask you, on the third page if that is your signature over your typewritten name?

A That is my signature.

Q Do you know what the purpose of this document was?

A I believe the purpose of this document was that if the time came that they had to take the second half of my account and turn it into cash, they could do it.

Q What had happened as a result of the first document, the one at September 30th, Exhibit No. 4? What had happened after you had signed this to half of your

account?

A Half of my account, the first time, went into stock in McDonnell & Company.

MR. BEEBE: I offer Exhibit 5 in evidence.

MR. BROOKS: No objection.

MR. STEIN: No objection.

MR. LOFLIN: No objection.

THE COURT: Received.

(Plaintiffs' Exhibit 5 received in evidence.)

(Plaintiffs' Exhibit 6 marked for identification.)

BY MR. BEEBE:

Q Do you recognize Plaintiffs' Exhibit 6 marked for identification (handing)?

A Yes, I do recognize it.

Q What is that?

A It's a stock certificate for stock in McDonnell & Company.

Q Was that issued to you under Plaintiffs' Exhibit 5?

A Yes, it was.

Q What happened to the half of your account that had securities in it?

A Right then?

Q Well, as a result of that.

A Well, I believe half of the account was sold and

I was given this.

Q The piece of paper--

A This piece of paper. And the other half for a short period of time remained until they were finally sold.

Q Did you have a meeting with Murray McDonnell regarding the second half of your account?

A Well, not really with Murray McDonnell. He brought a gentleman called Tom Ford to my house on a Sunday morning in October.

Q That was 1969?

A Yes.

Q Who was Tom Ford?

A Tom Ford was a lawyer. I believe with Shearman, Sterling and something.

Q Who did he represent?

A He represented, I guess, McDonnell & Company.

Q Could you explain what happened when they came out on that Sunday morning in October?

A Murray called me on the phone Sunday morning and said that he was bringing over Mr. Ford to the house to speak to me, which he did. And Mr. Ford said that I would have to sign a new agreement now that when the time--

MR. STEIN: May I object to what Mr. Ford told the witness as hearsay?

THE COURT: No, overruled. I will take it. Go ahead.

A Mr. Ford explained that I would -- that he was there to tell me about what would happen should they need more money, which would be that the second half of my account would be turned into cash for the use of McDonnell & Company, and he wanted me to sign this agreement, which I did sign the agreement.

Q Did you sign it right then and there?

A Yes, I did.

Q And had you been forewarned, or called beforehand to say they were going to come over?

A About a matter of a half hour, I guess.

MR. BROOKS: I object, your Honor.

THE COURT: To what part, just that--

MR. BROCKS: It's a leading question and it has been asked and answered.

THE COURT: Overruled. I take it they came over with this Exhibit 5, is that the document Mr. Beebe is referring to now?

MR. BEEBE: I am sorry, there is another exhibit I am going to offer at this point that they came over with. Why don't I do that--

THE COURT: Let's do that and ask her if that

is the document that they brought.

(Plaintiffs' Exhibit 7 marked for identification.)

MR. BEEBE: I would like to point out on the copies here that the numerals at the top left should be 101. The number 1 was cut off.

Q Now, Mrs. Murphy --

THE COURT: Mr. Beebe, I thought this was to be the exhibit that was brought over in October.

MR. BEEBE: Well now, I might have --

THE COURT: This seems to be something of January --

MR. BEEBE: This was brought over in October?

THE WITNESS: This one right here (indicating).

MR. BEEBE: All right. Let me lay that aside for the moment. I apologize. My mistake.

THE COURT: Exhibit 5?

Q We will go back to Exhibit 5 for a minute, which is already in evidence.

Was that the exhibit that they brought over, number 5?

A This is the paper that Mr. Ford brought.

Q And did you sign that right there?

A I signed that right there.

Q Had you ever seen that before that day?

A No, I hadn't.

Q What happened when Mr. Murray McDonnell and Mr. Ford came over that day?

A Mr. Ford --

THE COURT: Well, isn't that what you testified to earlier?

MR. BEEBE: I don't think we have gotten out on the record what transpired at that meeting.

Q Were they both in the room with you?

A No. Murray McDonnell did not stay in the room. It was just Mr. Ford. Explaining that this may have to happen, and how it would be done, and whatnot, and that, again, I had to sign that document.

Q Did that document pertain to the last half of your account?

A Yes, it did.

Q As a result of that document was the second half, or the last half of your account sold?

A Yes, it was eventually turned into cash.

Q Did you receive something in exchange for that?

A I believe I was to receive a piece of paper, but I'm not terribly sure now whether I ever got that paper.

Q Let me show you Exhibit No. 7 which I marked a little ahead of time a minute ago (handing), which is

headed "Subordinated Instalment Debenture" --

MR. STEIN: Your Honor, I am going to object to counsel leading the witness here. The response was that she didn't recall, and counsel did not say would this refresh her recollection.

MR. BEEBE: I will be glad to amend if necessary.

THE COURT: We will take our mid-afternoon recess at this point in any event.

Ladies and gentlemen, please go to the jury room and we will be in recess for ten minutes.

(Jury leaves)

THE COURT: Counsel, can I ask all of you when you foresee certain exhibits, or a whole batch of them coming in in the next session if you could get the little tickets from Mr. Dorsa and pre-mark them, it would save a great amount of time.

MR. BEEBE: I apologize.

THE COURT: Why don't you do that right now.

MR. BEEBE: I thought I had done that. We have only got one more.

(Recess)

(In open court; jury present)

DIRECT EXAMINATION CONTINUED

BY MR. BEEBE:

MR. BEEBE: I am told 6 hasn't been offered in evidence yet. I am offering 6 in evidence.

THE COURT: Any objection?

That is the preferred stock certificate.

MR. BROOKS: No objection.

MR. STEIN: No objection.

MR. LOFLIN: No objection.

(Plaintiffs' Exhibit 6 was received in evidence)

Q Now, Mrs. Murphy, before we had the recess Iwas asking you about Exhibit 7 for identification. Did you receive this document at some point?

A Yes, I did receive it.

Q What is this?

A This appears to be the turning of the second half of my account into cash.

Q Was this what you received in exchange for the second half of your account?

A Yes, it is.

MR. BEEBE: I offer this as the next exhibit in evidence, your Honor.

MR. BROOKS: No objection.

MR. STEIN: No objection.

MR. LOFLIN: No objection.

(Plaintiffs' Exhibit 7 was received in evidence)

Q Do you know when you received this debenture?

A I'm not exactly sure when I received it, but I believe it was quite sometime after it actually happened that I received it. I was a long time in ever receiving any of these papers.

Q Did there come a time when McDonnell & Company went out of business?

A McDonnell and Company closed in March of 1970. I believe it was around the 13th, 14th of March in 1970 that it finally closed.

Q Did you have any contact with anyone at McDonnell & Company at or about the time it closed?

A Yes. The day that it closed Murray McDonnell called me on the telephone and said he was sorry that it was all over. He was in tears. And that was the extent of the conversation. He then hung up.

Q Did you subsequently make a claim against McDonnell & Company in Delaware?

A I did file a claim, yes.

Q And did you subsequently amend it?

A I believe it was, yes.

Q I show you 8 for identification, which we have previously marked for identification in the recess, and ask if that represents your amended claim.

A I believe it does, yes.

MR. BEEBE: I offer that as the next exhibit.

MR. BROOKS: We have just gotten it. Can we have a second?

(Pause)

MR. BROOKS: No objection, your Honor.

MR. STEIN: No objection.

MR. LOFLIN: No objection.

(Plaintiffs' Exhibit 8 was received in evidence)

Q Were you ever an officer, director, or employee of McDonnell & Company?

A No, I wasn't.

Q What was the value of your account when it was subordinated in January 1969?

A I believe the account was worth around $350,000.

Q I don't know if we made this clear earlier.

but who did you loan your account to in the earlier transaction in 1965, I think you testified?

A I loaned my account at that time to my brother Sean.

Q Do you know what Sean did with the account?

A I believe he in turn loaned it to McDonnell & Company for an underwriting.

Q And what's the amount that you are seeking in this action today?

A I believe I am seeking in the area of $400,000.

Q And is the value -- are you seeking the value of your accountas of the end of January, when it was subordinated?

A Yes.

Q In response to this claim in Delaware against McDonnell & Company in 1971, or what was left of it, did you receive any payments?

A No, I didn't.

MR. BEEBE: No further questions on direct.

CROSS-EXAMINATION

BY MR. STEIN:

Q Mrs. McDonnell, just before the completion of your direct examination you mentioned that you made a loan toyour brother Sean. Do you recall that testimony?

A Yes, I do.

Q You gave that money to Sean, and you said that Sean gave the money to McDonnell, is that correct?

A I believe that's right.

THE COURT: Her account, not money.

Q Can you tell us the value of the account you loaned to your brother Sean?

A I don't have any idea what it was then.

Q Was it in the hundreds of thousands of dollars?

A I would assume it was. I don't know, though.

Q Can you tell me on what you would base your assumption that it was in the hundreds of thousands of dollars?

A I base that on what it was worth in 1969. There were not really many transactions in my account, I didn't do anything with it.

Q I gather from your direct testimony you did have an account at McDonnell & Company during 1966?

A I did.

Q Do you recall how many accounts you had at McDonnell during that period?

A In 1966?

Q Yes.

A I believe there was only one.

Q Do you know how much time prior to 1966 you had an account at McDonnell & Company?

A No. I dopn't know when it started. I think it was from when I was quite young.

Q When you say quite young, before you attained your majority?

A Yes.

Q Before you were 18, or 21 in those days?

A I believe so.

Q It's fair to say you had an account at McDonnell & Company for as long as you can remember?

A That's right.

Q Do you know the value of the securities -- did you know the value of the securities in your account from time to time?

A No, I didn't.

Q Did you ever have occasion to learn that it was in the hundreds of thousands of dollars?

A I don't think I really knew how much it was worth until after I had subordinated it in 1969.

Q Did you ever hear of a firm called Mercury Partners?

A I did.

Q What have you heard about that firm?

A Mercury Partners is an investment advisory service in New York City.

Q How did you come to know Mercury Partners?

A I came to know Mercury Partners by again Rick Olney calling me up and asking me to come into New York to McDonnell & Company to have lunch with two gentlemen who were going to begin an investment service called Mercury Partners. I went to New York to have lunch with them.

Q Did you subsequently make an investment in Mercury Partners?

A I did.

Q What amount did you invest in that company?

A I believe I invested $150,000.

Q Were the arrangements of your investing $150,000 written up in any way? Did you have a letter or some kind of a contract?

A There was a letter of agreement.

Q Do you remember signing a letter agreement?

A I believe I do.

Q Do you recall the date on which youmade this investment of $150,000 in Mercury Partners?

A No, I don't.

Q Would it ring a bell if I said around the middle 1960's?

A No, no, that's wrong.

Q Later or earlier?

A Late 60's. Excuse me, I thought you wanted an exact date.

Q It would be the late 1960's?

A Yes. I think 1967-68.

Q Can you tell me whether or not that money that was invested was ever returned?

A Yes, it was returned to me.

Q All of your capital was returned?

A Yes, I believe all of it.

Q Did you ever receive any interest, dividends, or profits on these transactions?

A Never -- when I took -- never before the money came out of Mercury Partners, I didn't getany interest on it. I don't remember how much I got out.

Q Let me see if we can try to piece this together. You testified that you invested $150,000 in Mercury Partners, and that at some point later on the investment was returned?

A Right.

Q Now, did you ever make a profit on that investment?

MR. BEEBE: Your Honor, excuse me. I am going to object to this line much further. I just don't see what plausible relevance it has to the issues in this case.

THE COURT: Do you want to come up to the side bar?

(At the side bar)

MR. STEIN: I deeply resent the accusation made by Mr. Beebe. I want to show the witness is financially sophisticated, has engaged in trading for years, and she knew a lot more than her direct testimony may have led the jury to believe. She was trading this account, made investments in unusual opportunities. I this this is very important.

THE COURT: Yes. The objection is overruled.

MR. BEEBE: May I explain my problem? I think it's fine to try to show she is sophisticated or unsophisticated, I am not afraid of that. But bringing in her money, and how much profit she made or didn't make, is not going to do anything but detract the jury from the present issues.

THE COURT: In order for Mr. Beebe to

investigate her state of mind in this transaction he has to explore what she did in other transactions. I can see that.

MR. BEEBE: That's fair enough. I can't object to that.

(In open court; jury present)

MR. STEIN: May I have the last question, sir.

(Record read)

A I am not really sure.

Q Mrs. Murphy, I gather you are an educated woman.

A I don't quite know how to -- in what way?

Q Did you go to college?

A Yes, I did.

Q What college did you go to?

A Manhattanville College.

Q Do you have a degree from that college?

A I do.

Q Which degree?

A A degree in English.

Q May I ask you the year of your graduation?

A 1955.

Q Would you be good enough to identify your

husband, and state his name?

A Do you want me to point to him?

Q No, just his name.

A His name is Robert J. Murphy.

Q Is your husband presently employed?

A Yes, he is.

Q By whom and what kind of job does he have?

A He works for Dillon, Reed as a registered representative.

Q And is it fair to say that he is in the securities business?

A He is now, yes.

Q How long has he been in the securities business?

A He has been in the securities business since late 1969.

Q What is your husband's educational background?

A He went to grammar school and high school in New Jersey, and then went to Georgetown College.

Q In Washington, D. C.?

A In Washington, that's right.

Q I believe on direct examination you mentioned that your husband, Mr. Murphy, was in the automobile business. Was that a Ford automobile dealership?

A Yes. He was a dealer in New Jersey.

Q And is it a fact that at one time he was the Ford dealer in Flemington, New Jersey?

A That's right.

Q And in Bedminster, New Jersey?

A Right.

Q And also in Bernardsville, New Jersey?

A That's right.

Q Is that three separate Ford dealerships?

A First he was in Flemington, and then he sold Flemington and he bought Bedminster and Bernardsville, which are only two tiny little towns a few miles apart. And in a short period of time he closed Bedminster and just had Bernardsville.

Q At the present time is he engaged in the automobile business in any way?

A No.

Q Was the acquisition of your husband's Ford dealership in any way connected to the fact that you have a sister who was formerly married to a member of the Ford family?

MR. BEEBE: Objection, your Honor.

THE COURT: Yes, I think this goes a little far afield. Sustained.

Q Mrs. Murphy, do you ever have occasion to discuss with your husband the kind of work he does for Dillon, Reed?

A I couldn't tell you specifically what he does for Dillon, Reed. I know in a rather general way.

Q Generally, are you familiar with the duties of a registered representative?

A Generally, yes, I am.

Q Can you tell us briefly what it is a registered representative does?

A A registered representative will sell stock to individuals, or businesses.

Q Do you ever have occasion to discuss with your husband the duties that he carries on in the sale of stock to individuals or businesses?

THE COURT: You are talking now about 1975, and that is a little beyond the time.

Q The question is: In or about 1969, did you have occasion to discuss these matters?

A He wasn't in business in 1969. He was in 1969 just a trainee.

Q Subsequent to that period of time, I would like --

MR. STEIN: Your Honor, I won't pursue this,

I just want to know if she has ever had occasion to discuss these transactions with her husband.

THE COURT: These transactions involving --

MR. STEIN: Transactions involving what a registered representative does, what his duties involve.

THE COURT: One or two questions, all right. Go ahead.

A As I said, I know generally what he does. We don't really discuss his daily activities, no.

Q Do you know if your husband ever had an account at Dillon, Reed?

A Whether he has an account at Dillon, Reed?

Q Had.

A I don't know whether he has an account there.

Q Have you ever had an account at Dillon, Reed?

A I don't know whether I really do or not. I am not terribly sure whether it is -- I guess I do have an account. I am not really very sure.

Q Now we are talking at the present time.

A You are talking about right now?

Q Right. Is your answer yes, you have an account or you are not sure?

A I don't have any stocks at Dillon, Reed.

Q Do you maintain an account at Dillon, Reed?

A Do you mean by that if I wanted to buy something or sell it would I do it through Dillon, Reed?

Q Do you have an account at the present time at Dillon, Reed?

A I think I do.

Q There were a number of documents that your lawyer showed you during the course of your direct examination, and I wonder if we can look at what was described as the subordination agreement. I believe that is Plaintiffs' Exhibit 3.

I wonder if we could have another copy of that document, Mr. Beebe. Do you have a copy there?

A Yes.

Q Do you have the subordination agreement in front of you, Mrs. Murphy?

A I do.

Q Would you be good enough to turn to page 3, and look at paragraph 2, which is entitled "Subordination." Do you see where I mean?

A Yes, I do.

Q Would you read the first eight lines aloud?

THE COURT: No, I don't see any purpose in that. You can read it yourself. If you want to base questions on it, go ahead.

MR. STEIN: I thought it might be easier for the jury if they knew what we were discussing. I can read it, if you would just as soon.

THE COURT: Let me see what her answer is having looked at it.

Q Would you read the first eight lines.

(Pause)

Q Mrs. Murphy, have you read the lines that I asked you to read?

A Yes.

Q Can you explain what your understanding of the words on the first eight lines of paragraph 2 is?

A I find the whole thing extremely difficult to understand.

Q Maybe if we take it line by line we can find out what the difficulties are.

THE COURT: Mr. Stein, would you come up with counsel for a minute.

(At the side bar)

THE COURT: Let me ask you, what are you getting at here? If it's a question of what's in the exhibit the exhibit is in evidence. I will let you read that part to the jury if you want. She testified that she signed this without reading it, if I remember

correctly. So all that seemed to me was left was you were going to ask her what sense she makes out of a legal instrument, and I wondered if that is what you are after how does that advance your cause?

MR. STEIN: Your Honor, I heard her say she didn't read the document. The fact is that the words -- I don't think that excuses anything she hasn't read it. The words are in plan and simple English. She claims she discussed the transaction with her husband, she claims she discussed the transaction with Mr. Olney and everyone says there is no risk, and if you read the eight lines it's perfectly obvious to anybody what it means.

THE COURT: You have first to get her off the position that she didn't read it.

MR. STEIN: It goes to credibility. If she tells me now she doesn't understand comparatively simple language I think it goes to her credibility.

MR. BEEBE: I would like to get the eight lines read in now, and I haveno objection.

THE COURT: Read the eight lines to the jury and ask her what she understands them to mean.

(In open court; jury present)

MR. STEIN: With the Court's permission I am going to read into the record the first eight lines of paragraph 2 of Plaintiffs' Exhibit 3.

MR. BEEBE: No objection.

MR. STEIN: Paragraph 2 is entitled "Subordination

"With respect to each account the owner hereby agrees to subordinate and hereby irrevocably does subordinate any and all claims with respect to the securities which he as owner, creditor or otherwise, may now or at any time hereafter have against the corporation to the claims of all other present and future creditors of the corporation," and this part is in (who have not also subordinated their claims) arising out of any matter occurring prior to the expiration date."

Q Mrs. Murphy, do you understand the part of the subordination agreement that I just read?

A No, sir, I don't.

Q With the Court's permission I am going to ask you to tell me what parts of the portion that I just read to you you do not understand.

A I don't understand any of it.

Q Well, can we start with the first words? It starts out, it says, "With respect to each account."

Do you know what that means?

A Does that mean to my account?

Q Well, I am asking you.

A No, I don't know what that means.

Q You don't know what it means when it says "With respect to each account"?

A No. I would only be assuming that that means my account, but I really don't know that.

MR. BEEBE: Excuse me. I object to going through this line by line, a document which she said she hadn't read at the time. And I don't understand what --

THE COURT: Unless the next question turns out to be more profitable I will sustain your objection.

Q I take it Mrs. Murphy you don't understand the language that I just read to the jury; is that your testimony?

A That's right, I do not understand that language.

Q Did you have occasion to discuss the subordination of your account with your husband?

A I did.

Q Did you tell your husband that Mr. Olney told you that no risk was involved?

A I did.

Q What was his response?

A I told him my entire conversation with Ric Olney, and he said, "Do you think we ought to look into this a

little bit?" And I said, "Don't you trust my family?"

And that was the extent of our conversation.

Q Did you give your husband a copy of the subordination agreement to read?

A No, I didn't.

Q Did he ever ask you for an opportunity to read the subordination agreement?

A No. The chauffeur came at 6:30 in the morning--

Q That's not my question, Mrs. Muphy. I asked, did he ever ask you for an opportunity to read the subordination agreement?

A No, he didn't.

MR. BEEBE: Excuse me. What time are we talking about?

THE COURT: I assume subsequent to its execution.

MR. STEIN: I am talking about at the time she entered into the subordination agreement, whether or not she had a discussion on the subject of what Olney told her, and that is that there was no risk involved.

THE COURT: Well, the problem is, Mr. Stein, that she is talking about 6:30 in the morning and you are talking about some generalized time.

MR. STEIN: Now let me see if we can pinpoint this with a bit more precision, your Honor.

Q When did Mr. Olney tell you that no risk was involved?

A In the afternoon.

Q This was the afternoon prior to the morning that the chauffeur came to bring you the documents?

A That's right.

Q Now, did you discuss with your husband your conversation with Olney during the course of that afternoon?

A No, I discussed it with him when he came home that evening.

Q So it was the evening before the chauffeur came to bring you the document that you had this discussion with your husband?

A That's right.

Q And you told your husband that Olney had said to you that day that there was no risk involved; is that correct?

A That's right.

Q Did your husband ask you whether or not the transaction was going to be documented in some kind of a writing?

A No, I don't think he asked me. I think I told him that the chauffeur would be there the next day, morning for me to sign the papers.

Q Did he ask you anything about the contents of the

papers?

A Not that I recall.

Q Did you during this evening discuss the subordination ag reement, or any subordination agreement with your husband?

A Just what I have testified.

Q In other words, you did not discuss with your husband any specific language; is that correct?

A That's correct.

Q You were telling us a moment ago that your husband and you discussed Ric Olney's advice which was to the effect that there was no risk. Do you recall that?

A That's right.

Q Did your husband advise you against subordinating the securities in your account?

A He did not advise me not to do it or to do it.

Q Did your husband suggest that you undertake a more thorough investigation of what Mr. Olney was saying?

A He just said, "Do you think you should have somebody look into this?" And I said, "Don't you trust my family?"

Q And that ended the conversation?

A That was the end of the conversation.

Q And the next morning you signed these papers?

A That's right.

Q And you testified on direct that you didn't read the papers before you signed them?

A No, I didn't read them.

Q Did you tell your husband on the evening before that you intended to sign papers without reading them?

A No, I didn't say -- I didn't.

Q Did you tell your husband shortly after you signed the papers that you had signed the papers without reading them?

A Well, I think he knew that. The chauffeur arrived and he was not in my house more than two, three minutes. I signed the papers in the front hall and handed them back to him.

Q I understand that, Mrs. Murphy. But the question is, did there come a time after you signed these papers, that is shortly thereafter, in the more or less immediate aftermath, that you told your husband you had signed some papers without having read the papers first?

A I don't remember whether I said that--

Q You don't remember one way or the other?

A No.

Q Mrs. Murphy, would you look at Plaintiffs' Exhibit No. 1, which I think is before you?

MR. STEIN: Your Honor, in connection with this line of questioning could we have the clerk mark as Defendant McDonnell & Company's Exhibit A for identification a document which is entitled "New York Stock Exchange allied member or non-member application".

(Defendant McDonnell & Company Exhibit A marked for identification.)

BY MR. STEIN:

Q Now would you be good enough to look at Plaintiffs' Exhibit No. 1 which you have before you, I believe, and the document that has just been marked as Defendant's Exhibit A for identification (handing).

A This is basically the same.

Q You say basically the same. Can you pinpoint any differences, Mrs. Murphy?

A Between the two of them?

Q Yes, ma'am.

A Yes. In the second one -- in the first one it's all typewritten in, and in the second one that you have just handed me some of the handwriting is mine and some of it is not mine.

Q Mrs. Murphy, do you recall if your brother Murray's chauffeur had both versions of this form with him, that is the typed form which is Plaintiffs' Exhibit 1 and

the partially handwritten form which is Defendant's Exhibit A?

A I don't know.

Q Do you recall whether or not you signed both forms?

A Both of these.

Q That's correct.

A No, I don't remember.

Q Would you be good enough to look at the execution portion of Defendant's Exhibit A and see if you can find your signature?

A The one you handed me.

Q Yes, that's correct.

A Yes, that is my signature.

Q So that you signed the typewritten form as well as signing the form that bears the handwritten notations?

A Yes.

Q Do you know whether one or both of those forms was in blank at the time you signed it?

A I don't know.

Q Can you tell me when the first occasion was that you saw the form containing the handwritten notations?

A The first time I remember seeing this form?

Q Yes.

A The first time I remember seeing it was in my

attorney's office.

Q Which was after the litigation was started?

A That's right.

Q When did you sign Defendant's Exhibit A, that is the form that has the handwritten notations?

A I don't remember. I don't know.

Q Do you have any recollection of signing Defendant's Exhibit A at or about the same time you signed Plaintiffs' Exhibit 3?

I'm sorry, Plaintiffs' 1. Let the record show that Plaintiffs' 1 is the document, that is the two application forms..

A No, I don't remember. I don't know.

Q Do you have any recollection of signing Plaintiffs' Exhibit 1 when Murray's chauffeur was in your house?

A No. I cannot tell you. I don't know which I signed.

Q Well, you know that you signed one of the application forms when he was there?

A I assume I did, yes. But I don't know which one.

Q Well, do you know if you signed both of them at the same time that Murray's chauffeur was there?

A I could have. I don't know.

Q Did Murray's chauffeur, or did Mr. Olney, or did

Murray himself ever explain to you the purpose of having the two versions of the same form brought out to you by Murray's chauffeur?

MR. BEEBE: Objection. I don't think it has been established that both forms came out.

THE COURT: No,there is no foundation for that.

MR. STEIN: But it hasn't been established that they weren't.

THE COURT: No, there is no foundation for that. Sustained.

Q I gather your testimony is, Mrs. Murphy, that you don't know whether in fact youhad two versions of the same form on the morning that Murray's chauffeur came out to your house?

A That's right.

Q Is that correct?

A Yes.

Q But you are sure you had at least one version of the form; is that correct?

A I'm pretty sure.

Q And you don't know which version it was, Plaintiffs' Exhibit 1 or Defendant's Exhibit A; is that correct?

A That's right.

Q It was one or the other?

A I assume so, yes.

Q But it wasn't both?

A I don't know.

Q Did your husband ever discuss with you his opinion of your brother, T. Murray McDonnell?

A Yes. Yes, he has.

Q Isn't it a fact that your husband has said that he has a pretty low opinion of your brother, T. Murray McDonnell?

A That's right.

Q The Murphys, that is you and your husband, and T. Murray McDonnell are members of the same clubs in the New Jersey suburbs, aren't you?

A Yes, we are.

Q Isn't it a fact that from time to time your husband would see T. Murray McDonnell at social events or at transactions involving the leasing of automobiles?

A That's right.

Q And isn't it a fact that your husband has described these occasions as "too often"?

A I don't remember whether he said that.

Q Maybe I can refresh your recollection. If I can refresh your recollection, I am reading from page 25 of a deposition in this case of your husband, Robert Murphy.

Question, of Mr. Murphy, "Q Would you ever have discussions with any of the McDonnell family who were actively engaged in the business about the condition of McDonnell & Co. prior to February, 1969?

"A No.

"Q How often would you see Murray McDonnell?

"A Too often."

Does that refresh your recollection, Mrs. Murphy?

A Yes.

THE COURT: As to what?

A But that wasn't what you asked me.

Q As to whether or not your husband ever said that he saw T. Murray McDonnell too often?

A Well, he said it there.

Q Would you be good enough to look at the financial supplement to your application to become an allied member? I believe it is Exhibit 2, Mrs. Murphy.

Do you have the document before you?

A Yes.

Q Would you read line 1, it's very short, your Honor, it starts out, "My net worth" --

MR. BEEBE: I object to that, your Honor.

THE COURT: Well, it is in evidence. Do you want to read it to the jury?

MR. STEIN: Yes, sir. I will read it, your Honor, with your permission. It says, "My net worth, including equities in real estate, securities, etc., is in excess of $500,000."

Q Was that a fact as of the date you signed Plaintiffs' Exhibit 2, Mrs. Murphy?

A I didn't write down that figure.

Q Did you sign Exhibit 2?

A Yes, I did.

Q And did you sign Exhibit 2 on or about February 4, 1969?

A I believe so.

Q And on or about February 4, 1969, was your net worth in excess of $500,000?

A I don't know --

MR. BEEBE: Objection.

THE COURT: No, overruled. What is the grounds for the objection?

MR. BEEBE: The objection is I don't see the relevance.

THE COURT: Overruled.

Q Would you be good enough to answer the question? now?

MR. BEEBE: She did, I believe.

A You said -- could you ask it to me again?

MR. BEEBE: Excuse me. I believe it was answered despite my objection.

THE COURT: Would you read the question, please, Mr. Reporter.

(Question and answer read.)

BY MR. STEIN:

Q Do you want to think about that for a minute, Mrs. Murphy?

A No, I don't know what I was worth.

Q You don't know what your net worth was as of February 4, 1969?

A No.

Q Was it $10,000,000?

A I don't know.

Q It may have been $10,000,000; is that right?

A If you say so. I don't know.

Q Was it $100?

MR. BEEBE: I object.still in the area of how this relates after it has gone so far into this area that is not at issue in this case I don't believe.

THE COURT: Overruled.

Q Well, let's see if we can establish just how wealthy you were in February of 1969.

Was your net worth $100, or was it $10,000,000? Surely you know it was either closer to $100 or closer to $10,000,000?

THE COURT: I will sustain an objection to the form of that question.

MR. BEEBE: Thank you.

MR. STEIN: I would please ask my colleague, Mr. Beebe, not to make hand signals to the witness.

THE COURT: I didn't notice--

MR. STEIN: I did, your Honor.

MR. BEEBE: I beg your pardon. I think the witness was about to answer when the objection had been sustained, and I thought it was appropriate to prevent her from answering.

THE COURT: If that's what it was and I didn't say anything to the contrary, that's perfectly proper where I am about to rule on a question that is put. Put your next question, please.

Q That $500,000 as your net worth, was that inclusive of the value of the securities to be subordinated, that is the $342,000, or didn't it include those securities?

A I don't know.

Q What did your net worth consist of in February, 1969?

A My account at McDonnell & Company, my home in New Jersey, my account at Mercury Partners, and I think that's it.

Q Any real estate other than your home?

A I had a home in New Jersey and a piece of land in Southampton, Long Island.

Q Mrs. Murphy, did you inherit any money from your father, James Francis McDonnell, Sr.?

A The money I had was from my father.

Q How much was that?

A My account at McDonnell & Company.

Q That was the $342,000 that you have just been talking about?

A Yes, what I had was from my father.

Q I take it then that you inherited $342,000 from your father?

A I had received prior to that money stock from my mother. It came from both of them.

Q I am only trying to find out the amount of your inheritance if you know it.

A I don't know what it is -- was.

MR. STEIN: Your Honor, I am going to ask the witness to look at the amended complaint in this case, and since it is a pleading I don't think there is any need

to mark it unless your Honor would --

THE COURT: No, go ahead.

Q Would you turn to the last page of your complaint in this case, Mrs. Murphy, after the word "wherefore" (handing).

How much money are you claiming in this case?

A It reads for the damages in the amount of $400,000 together with interest.

Q You are claiming $400,000; isn't that correct?

A Yes.

THE COURT: That's what the witness says, yes.

Q Now would you look at the last page of Plaintiffs' Exhibit 3 of the subordination agreement. Do you have the very last page of Exhibit 3 in front of you?

A I do.

Q What is the total amount on that page?

A $342,433.

Q Isn't it a fact that that was the value of the securities in your portfolio at the time you entered into the subordination agreement, $342,000?

A I believe so.

Q Now would you look at Plaintiffs' Exhibit 8, which is the amended proof of claim filed with the Delaware Chancery Court, would you look at the first page?

the very first page where it has the title, "Amended proof of claim."

How much did you claim in that proceeding?

A $376,000.

Q Mrs. Murphy, could you make up your mind how much you are owed, $400,000, $342,000 or $376,000? What is it?

MR. BEEBE: Objection.

THE COURT: Sustained as to form.

Q Mrs. Murphy, how much do you claim you are entitled to, $400,000 as appears from your complaint, $342,433 as appears in your subordination agreement, or $376,000 as shown on your amended proof of claim?

A And you're asking me what?

MR. STEIN: Would you read the question, please, Mr. Reporter?

(Question read.)

A I'll take $400,000.

Q Okay. When you say you will take $400,000,that means you would prefer it to one of the lesser sums?

A That's right.

Q Now, do you know a man by the name of Keith Burdon?

A I did know Keith Burdon.

Q Did you ever have occasion to telephone Keith Burden during 1969 to make any inquiries?

A I believe I called Keith Burden when Ric Olney wouldn't answer my calls any more.

Q And did you have any specific reason for calling Mr. Burden?

A In the summer of '69 when I had her thing were not going well I did try to find out what was going on.

Q Did you make any inquiries of him as to the condition of McDonnell & Company in the summer of 1969?

A Yes, I would ask him how were things going.

Q Were you calling as a concerned family member?

A Yes.

Q You were calling as a concerned family member about the firm rather than about any specific transactions you wished undertaken with respect to your own account; isn't that right?

A Can he reread that for me?

(Question read.)

A I was calling to find out how it was done, not to make a transaction in my account, which I had never done.

Q Well, were you calling as a concerned member of the family firm?

A Yes.

Q Now, taking the summer of 1969 you were a concerned member of the family firm; is that correct?

MR. BEEBE: Objection.

THE COURT: Yes, sustained.

Q Let me ask you this, Mrs. Murphy: Were you a concerned member of the family firm when your brother, Murray, came to you in February of 1969?

MR. BEEBE: Excuse me. I object on the grounds that that assumes facts that are not in evidence.

THE COURT: Yes, I agree with you. I will sustain the objection to the use of the words "family firm" which I don't think --

MR. STEIN: Your Honor, perhaps if I read from Mrs. Murphy's deposition it might improve the clarity. Mrs. Murphy testified --

MR. BEEBE: Well, let's --

THE COURT: Let's put proper questions and use the deposition as circumstances allow.

MR. STEIN: All right.

Q Mrs. Murphy, do you recall testifying at a pretrial deposition in this case on May 30, 1973?

A Yes, I do.

Q Do you recall Mr. Brooks of the Milbank Tweed

firm asking you these questions and you giving these answers which I am about to read to you --

MR. BEEBE: Excuse me, your Honor, could we have the page?

MR. STEIN: Page 80.

THE COURT: before we get to that, ladies and gentlemen, a deposition is an instrument in which at some prior time the lawyers have taken the testimony of a witness under oath, generally in a lawyer's office or in a room in the courthouse, and it is involved in the case just the same as if the witness were here at the time, only it is before trial and the evidence is gathered prior to the trial. That is the exact instrument that is being used at this time.

Q These are on calls to Keith Burden.

"Q You were calling as a concerned family member about the firm rather than about specific transactions you wished undertaken with respect to your account; is that right?"

MR. BEEBE: Same objection, your Honor. All objections were preserved at the time of the taking of the deposition and there is no foundation there or any place that she was a member--

MR. STEIN: There is no objection on the

transcript, your Honor. There is no objection in this transcript. I wasn't there. There is no objection.

MR. BEEBE: They were all preserved, your Honor.

THE COURT: What is the question again?

MR. BEEBE: Shall we read it, or--

THE COURT: No, just bring it up, please.

MR. BEEBE: It starts on line 16 (handing).

THE COURT: Overruled.

MR. STEIN: Shall I have the court reporter read it back?

THE COURT: Why don't you ask her if she was asked this question and did she give this answer.

Q Were you asked this question and did you give the answer to the following:

"Q You were calling as a concerned family member about the firm rather than about specific transactions you wished undertaken with respect to your account; is that right?

"A The first part. As a concerned member of the family firm."

Do you remember, Mrs. Murphy, being asked that question and making the answer that I just tead?

A Yes, I do.

Q Now, I would like to ask you whether or not

in February of 1969 you were a concerned member of the family firm when Murray came to see you?

A Murray didn't come to see me.

Q When Murray called you on the telephone were you a concerned member of the family firm?

A I think you are putting words thee. He asked me --

Q I would like to know simply, Mrs. Murphy, whether or not--

MR. BEEBE: Can she finish her answer, please?

THE COURT: Yes, let her finish her answer. Go ahead, please.

A Murray said he wanted to borrow the money for a short period of time, and Ric Olney would call me. That was the extent of my conversation.

Q I am asking you about your state of mind at that time.

THE COURT: Whether you were a concerned member of the family firm.

Q Exactly.

A I didn't have anything to be concerned about. I was loaning the money for an underwriting.

Q That is not the question.

THE COURT: That is an answer. And on that answer

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we are going to recess until 9:30 in the morning. We will sit tomorrow from 9:30 to 1:30 with a recess in the middle of the morning.

Ladies and gentlemen of the jury, don't forget my admonition not to talk about the case either at home or anywhere else, and to keep an open mind. It has just begun.

(Adjourned to April 29, 1975, at 9:30 A.M.)

MARGARET MARY MC DONNELL MURPHY, et al.

vs. 71 Civ. 461
71 Civ. 1940

MC DONNELL & CO., INC., et al.

April 29, 1975
9:30 a.m.

Trial resumed.

- - -

(In open court; jury present)

THE COURT: Mrs. Murphy, will you resume the stand.

M A R G A R E T M A R Y M C D O N N E L L M U R P H Y, resumed.

THE CLERK: Mrs. Murphy, you remain sworn from yesterday.

CROSS-EXAMINATION CONTINUED

BY MR. STEIN:

Q Mrs. Murphy, you testified yesterday about some discussions you had with Mr. Olney on the afternoon

prior to the date that you signed the subordination agreement. Do you recall that testimony?

A I do.

Q Do you claim that Mr. Olney said things to you that misled you into signing that separation agreement?

A I do.

MR. BEEBE: Excuse me, separation agreement?

MR. STEIN: Subordination agreement.

Thank you, Mr. Beebe.

Q On what do you base the claim that Mr. Olney misled you?

A On what do I base the claim?

Q Yes.

A I base the claim on the fact of what he did tell me in that conversation, which is proven now not to have been true at all.

Q What is it that has been proven not to be true at all?

A That you cannot sell seats on the New York Stock Exchange, paintings off the wall, and furniture in an office, and give it back, pay back, a subordinated lender. And that there were risks. And he promised me I never could lose my money.

Q When did you find out for the first time that what Mr. Olney told you about the sale of the seats and paintings, and there not being any risks -- when did you find out that these things were in fact untrue?

A The first time I became aware of it was in the summer of 1969.

Q How did you become aware of it in the summer of 1969?

A It was through various conversations with members of my family that I found out I wasn't --

Q Well, let's find out with whom you had these conversations.

A In August of 1969, I had been talking quite often with my brother Jim and my brother Morgan, and then in the fall of 1969, when I talked by telephone with Paul McDonald.

Q Let's go back to your conversations with your brother Jim. What did your brother Jim tell you on the subject of the firm not being able to sell seats and paintings to satisfy the claims of its subordinated lenders?

A I don't remember specifically talking to -- I remember talking to Jim inasmuch as I don't think I repeated to Jim at that time exactly what Rick Olney had

told me. I repeated that conversation to Paul McDonald, but Jim explained to me that as a subordinated lender I stood to lose everything.

Q And this is the first time you learned that some of the -- at least some of the information given to you by Rick Olney was untrue, is that right?

A Right.

Q When you received that information from your brother Jim, did you act on it?

A I acted on it inasmuch as I remember trying to call through to McDonnell & Company, and I know in August that I did talk once with Keith Burden.

Q You mentioned on your direct testimony yesterday that you had a conversation with your sister-in-law Sandra McDonnell in which you were informed the firm was in bad financial condition. Do you recall that testimony?

A Yes, I do.

Q I believe you testified that that conversation was in the early spring of 1969, is that right?

A Yes. To the best of my knowledge, it was.

Q Would that have been March or April or thereabouts?

A I would put it more towards the end of April,

May.

Q When you received that particular piece of information in the end of April or in May from your siter-in-law, did you take any steps to conclude whatever arrangements you had with the company to leave your account in the company -- that is, to terminate the subordination agreement?

A Do you mean did I specifically try to --

Q End the arrangements whereby you had subordinated your securities?

A No, I didn't.

Q Did you ever at any time subsequent to this conversation with Sandra -- I am now talking about the period of time starting with May of 1969, all the way through up until October, make an attempt to end these arrangements with McDonnell & Company?

A I did, in September, when I met Paul McDonald.

Q So from May to September you made no such attempts, is that right?

A I don't believe so, no.

Q What did you do in September when you met with Paul McDonald? Did you tell him you wanted out?

A Yes.

Q And that's the first time you told anyone from

McDonald & Company you wanted out?

A To the best of my knowledge it is, yes.

Q I recall some testimony yesterday about a meeting with Paul McDonald in September of 1969. Are we now talking about the same meeting?

A That's right.

Q Was this a face-to-face meeting that you had with him?

A The first one was face-to-face, yes.

Q And he was present and you were present?

A That's right.

Q Was anybody else present?

A My husband was with me.

Q We are now talking about September of 1969. By this time your husband had become associated with a brokerage firm, had he not?

A Yes, he was in the training program in September.

Q Of what firm?

A Clark, Dodge & Company.

Q As a result of these meetings with Paul McDonald that you and your husband attended in September of 1969, did you learn that a recapitulation of the business was being planned?

A Yes, I did.

Q Were you also present at a meeting in October of 1969 at your home with your brother Murray and your husband, Mr. Murphy, as well as Tom Ford?

A Yes, I was.

Q And was recapitulation also discussed at that meeting?

A Yes, it was.

Q And isn't it a fact that that meeting led to the acceptance of certain terms and conditions as set forth in the recapitulation letter which is Plaintiffs' Exhibit 4 and Plaintiffs' Exhibit 5 in evidence?

A I don't really understand your question.

THE COURT: Mr. Stein, she doesn't have the exhibits before her, and the numbers don't mean anything to the witness at this point.

MR. STEIN: I am sorry, your Honor.

THE COURT: I say the witness doesn't have the exhibits before her and the numbers don't mean anything to her.

MR. STEIN: Could we have Exhibits 4 and 5, please?

MR. BEEBE: I will put all the exhibits in front of the witness.

MR. STEIN: My mistake, your Honor.

THE COURT: May we have the question read back, please?

(Question read)

A Well, Exhibit 4 was prior by -- I just guess a few weeks -- to Exhibit 5.

Q In other words, the meeting at your home came after Exhibit 4, but before Exhibit 5? Is that correct?

A That's right.

Q I take it then that the meeting at your house led to your acceptance of the terms set forth in Plaintiffs' Exhibit 5?

A That's right.

Q That is, the recapitulation?

A That's correct.

Q Did there come a time thereafter that you received a series G debenture?

A Is that Exhibit 6? The stock certificate?

Q No, I am talking about a series G debenture now.

A Oh, I see it.

Q I believe that is Exhibit 7.

A I received this later, yes.

Q And did there come a time that you also

received Exhibit 6, the stock certificate?

A Yes, there did come a time.

Q And your receipt of these documents representing your interest in McDonnell as it was recapitulized came as a result of your entering into the arrangements which are set forth in the agreement, which is Plaintiffs' Exhibit 5? Is that correct?

A To the best that I understand the question, it is.

Q When you became aware that the company was in serious financial difficulty, in this period 1969, end of April, or May, did you have any conversations with your brother Murray?

A About the business?

Q Yes.

A Never.

Q Did you ever say to anybody, confide in anybody, that your brother Murray had made a terrible mess of the whole situation?

A At this time?

Q During 1969.

A No, I don't believe so.

Q Did you ever say this about your brother Murray to anybody after 1969?

A After the close of the firm?

Q Yes.

A I'm sure I did.

Q Isn't it a fact that after the close of the firm you considered that Murray had made a terrible mess of things?

A I did.

Q Did you ever bring a lawsuit against your brother Murray?

A No, I didn't.

Q Did you ever bring a lawsuit against any other member of the McDonnell family?

A No, I haven't.

Q You brought a lawsuit against the referee, didn't you?

A (No response)

Q Did you or didn't you?

THE COURT: Yes. That's the suit we are here on.

MR. STEIN: I have no further questions.

MR. BROOKS: Does the witness have the exhibits before her that the plaintiff introduced?

THE WITNESS: She does.

MR. BROOKS: I will give the witness the

exhibit that McDonnell & Company introduced.

CROSS-EXAMINATION

BY MR. BROOKS:

Q Mrs. Murphy, you testified about telephone conversations that you had with your brother Murray and his assistant Rick Olney shortly before you signed the subordination documents. Did you have any such telephone calls with anybody who was an officer or director or employee of the New York Stock Exchange prior to your signing the subordination documents?

A No, I didn't.

Q Did you ever have any such telephone calls after you signed your subordination documents at any time?

A With the New York Stock Exchange?

Q Any officer or director or employee.

A No.

Q And before you signed the subordination documents did you receive any written communication from the New York Stock Exchange, either a letter or a memo or such?

A I don't believe so, no.

Q And after you signed your subordination documents did you receive any such written communication

from the New York Stock Exchange?

A Not to the best of my knowledge.

MR. BEEBE: Excuse me, I am sorry to interrupt, but I think we have some exhibits up there that are communications to the --

THE COURT: That will be for your redirect, Mr. Beebe, if that's the case.

Go ahead, sir.

MR. BROOKS: I think perhaps we should explore Mr. Beebe's point, as long as he brought it up, your Honor.

THE COURT: All right.

Q There are some written documents up there, Mrs. Murphy. Will you take a look at Plaintiffs' Exhibit 1. That is entitled "Allied member or non-member application." And that is the document, I believe, that you testified yesterday you signed without reading. Is that correct?

A That is correct.

Q And that is an application to the New York Stock Exchange by you, isn't it?

A Yes, it appears to be.

Q And then there is Exhibit 2, which is a financial supplement to that application. I believe you

testified that was signed by you, did you not?

A That's right.

May I say something? I don't believe --

Q No.

THE COURT: Well, Mrs. Murphy, you are really responding to questions that are put to you, so the questions can be ruled on in the first instance, and, therefore, in things of this kind I am sure your counsel will take care of it in due course.

THE WITNESS: I hope so.

THE COURT: Go ahead.

Q I ask you to look at Plaintiffs' Exhibit 4, which perhaps Mr. Beebe was referring to.

As I recall, you testified yesterday that that was signed by your husband on your behalf with your consent. Is that correct?

A That's right.

Q That is a letter dated September 30, 1969, signed on your behalf to a Mr. Robert M. Bishop, vice president, director, Department of Member Firms in the New York Stock Exchange, is it not?

A Yes.

Q Do you see any other document in front of you which could possibly be a written communication from

the stock exchange to you?

A No.

Q Mrs. Murphy, let's go back to the beginning. When were you born?

A March 22, 1933.

Q When did your father die?

A My father died in July of 1958, I believe.

Q My only purpose in reminding you of these dates is to ask you whetheryou had a long and close relationship with your father during the time that you were both alive.

A Yes, I did.

Q Would you say that your father provided well for his family?

A I would.

Q What was his sole business during the time that he provided well for his family?

A He ran a firm on Wall Street.

Q And what was the name of that firm?

A McDonnell & Company.

Q And that was named after your father, wasn't it?

A That's right.

Q Was he proud of that firm?

A I would believe so, yes.

Q Didn't you know so?

A Well, I never heard him say in those words "I am very proud of what I did."

Q Didn't you know he was?

A He was a very humble man.

Q But didn't you know he was proud of that firm that he built?

A I would assume thathe was proud of what he did.

Q How many children did Mrs. McDonnell, your mother and your father, have?

A 14 children.

Q Did he provide equally for each of those 14 children in bequests and gifts throughout his life and at his death, fairly equally?

A I can't really say.

Q You did say thathe did give you the assets that were in your account which you subordinated, did you not?

A That's right.

Q Did you have a godfather, Mrs. Murphy?

A Yes, I did have a godfather.

Q Who was that?

A Murray McDonnell.

Q And who took over running the firm of McDonnell & Company on the death of your father?

A Murray did.

Q I believe you testified yesterday you received a degree in English from Manhattanville College.

A That is correct.

Q Was that a four-year program that you went through at Manhattanville?

A That's right.

Q How many other members of the Murphy family had accounts at McDonnell & Co. at about January 1969, beside yourself?

A Five of my children had accounts and I believe my husband did.

Q And you had one?

A I believe that's right.

Q Not more than one?

A I don't know.

Q How many children did you have in January of 1969?

A I had five children.

Q Did any of your children have more than one account at McDonnell & Co.?

A Yes, I believe they did have more than one account.

Q Do you know how many more?

A I think possibly the three oldest had two accounts. I think that is right.

Q And how many did Mr. Murphy have, if you know?

A I believe only one.

Q Did you get account statements in respect to your account from time to time up until February of 1969 when you entered your subordination transaction?

A I did get account statements.

Q Did you read them?

A No, I never read them.

Q Do you ever recall receiving with those account statements a financial statement showing the financial condition of McDonnell & Company?

A I do remember that occasionally there was a rectangular piece of stiffer paper enclosed with the statement.

Q Was that a financial statement?

A I believe it was.

Q Did you read those financial statements?

A Never.

Q Were the accounts of your children at McDonnell & Co. in the names of adults as trustees or custodians?

A Yes, they were in names of trustees or custodians.

Q And were the custodians and trustees the same on all your children's accounts?

A I'm not sure. I'm really not sure. I wasn't a custodian -- my husband and I might have been custodians on one account. The address label, which I'm sure you have seen, was a very difficult one to read.

Q I'll ask about the address label. I think the jury should know about it, Mrs. Murphy.

Did you ever trade securities in your account? By that I mean did you ever buy a stock and sell another stock?

A I only recall once in those years.

Q In how many years would that once be?

A Since I was married.

Q How about your children, did they ever have securities bought or sold by their custodians or trustees?

A I don't know.

Q Did you ever look overthe accounts of your children?

A Me personally, no.

Q Did anybody on your behalf?

A I believe once Rick Olney reviewed those accounts.

Q Tell me, when you had that one transaction where you purchased or sold a security, were you charged the normal commission that a customer is charged?

A I wouldn't have any idea.

Q How about all of the other period of time when your account was in the firm, was there any charge to you for the service of holding that account?

A I have no knowledge of that.

Q How about your children, was there any charge to them?

A I don't know.

Q Do you know about your husband?

A I don't know.

Q You did know in January of 1969 that Murray and Morgan were working and were officers in the firm of McDonnell & Co., did you not?

A I know Murray was running it in New York.

I don't know where Morgan was at that time.

Q I didn't mean to limit my questions to New York. You may recall I think we have established that McDonnell & Co. had offices throughout this country and in some foreign countries.

MR. BEEBE: Objection. I believe that was in opening statements but there has been no testimony about that. So I object.

THE COURT: Sustained as to form.

Q I didn't mean to confine my question to McDonnell & Company in New York, but any office of McDonnell & Company.

A Morgan was with the firm, yes.

Q Were you and Morgan fairly close in age in your family?

A No. He's older than I am. I don't know how much.

Q About how much older?

A I would say probably five, six years older than I am. Maybe more.

Q During the course of your lives together did you have occasionto write to Morgan and he to write to you, such as birthday cards?

A Christmas cards would have been about the

extent of it.

Q You think you would recognize Morgan's signature?

A Yes, I know Morgan's signature.

Q Let me show you a document with Morgan's signature on it and ask you if you can tell me whether that's his or somebody else's.

I show you what has been pre-marked as New York Stock Exchange Exhibit A for identification. Is that Morgan's signature on New York Stock Exchange Exhibit A?

A I cannot swear to that. The Morgan looks like Morgan but the McDonnell doesn't look right to me.

Q Well, if I read to you a sworn statement by Morgan McDonnell that it was his signature, would you dispute that?

A No, I wouldn't. I wouldn't dispute it.

MR. BEEBE: Could I save some time here just by stipulating to that? I have no objection.

MR. BROOKS: You will stipulate that is the signature?

MR. BEEBE: For the purposes of this trial.

MR. BROOKS: Fine.

Q Mrs. Murphy, would you describe what that

document is to the jury that's signed by Morgan McDonnell?

THE COURT: I don't see any purpose in that.

MR. BROOKS: May I describe it?

THE COURT: If you get it in evidence you may read it. At this point it's not in evidence and I don't see any purpose in the witness describing the document.

MR. BROOKS: I will then offer it in evidence.

THE COURT: All right.

MR. BEEBE: No objection.

THE COURT: Very well. It may be received.

(Defendant New York Stock Exchange Exhibit A was received in evidence)

MR. BROOKS: If I may, I will describe it now.

THE COURT: You may read it if you wish.

MR. BROOKS: I think it's a little long and cumbersome to read.

THE COURT: You may read some parts of it. What I am trying to avoid, Mr. Brooks, is a lawyer's characterization of it being interposed between what the document is and the jury's understanding of it.

Go ahead.

(Defendant New York Stock Exchange Exhibit A in evidence was read to the jury)

MR. BROOKS: I have omitted from the reading certain passages which I do not think are helpful. Mr. Beebe may read those passages if he feels they might be helpful.

Q My question is, do you know that Morgan proposed you for approval to the New York Stock Exchange?

MR. BEEBE: I don't think he proposed her in his capacity. Objection.

THE COURT: Overruled. I think it's clear.

Q Exhibit A, Mrs. Murphy, indicates that Morgan is signing as an exchange member. Did you know that Morgan McDonnell was an exchange member on or about February 4, 1969?

A No, I didn't. I don't know what an exchange member is.

Q Do you know what a member of any organization is, don't you? You know what a member is, don't you?

A A member of a club? I know that, yes. But I don't know what a member of an exchange is.

Q Did you have any conversations with Morgan McDonnell before or on February 4, 1969, about your subordination transaction?

A No, I didn't.

Q He didn't tell you anything about McDonnell & Company, did he?

A At that time?

Q Yes.

A No, he didn't.

Q Let's go back to 1965 and 1966. I believe you testified thatyour brother Sean asked if he could borrow your account for an underwriting, I think you said. And you agreed. Did you sign any documents at that time to evidence that loan of your account?

A I don't remember.

Q How did he ask you? Did he ask you over the phone?

A Over the telephone, yes.

Q Did you give it any thought or did you just say "Sure"?

A He asked me if I would loan it to him for a couple of months and I said yes, I would.

Q There was no discussion with your husband about that transaction, was there?

A I believe my husband talked to Sean, too.

Q Befoer you agreed to the transaction?

A On or about the same time, same day, next day.

I don't remember.

Q Can you tell me whether your husband talked to Sean before you committed yourself to make the loan or after?

A Well, technically I had said yes to him and then my husband talked to him.

Q Do you know what your husband learned from Sean?

A That he wanted it just for a very short period of time and he would return it to us as soon as he was finished.

Q Anything else.

A I don't remember.

Q Now, there was no doubt in your mind, was there, that the proceeds of your loan were to be used to support the business of McDonnell & Company?

A Well, I was loaning at that time to my brother Sean personally.

Q But you didn't understand he was going to buy a house or a sailboat or anything with it, did you?

A No, I know he wanted it for business.

Q To invest it in the firm; right?

A I knew he wanted it for business. I didn't know what -- I still don't understand what an underwriting

or any of it is.

Q Did he say he wanted it for an underwriting?

A I believe so, yes.

Q That would be an underwriting of McDonnell & Company, wouldn't it?

A I don't know.

Q He did work there, didn't he?

A Yes.

Q Did you know that he was a capital investor of McDonnell & Company at the time he asked you for a loan?

A No.

Q You didn't know that?

A No.

Q Did you sign any documents at all?

A Not that I can remember.

Q Yesterday you testified that as a result of your loan to Sean you received approximately $700 in interest. Do you recall that testimony?

A I do.

Q Is that your recollection today?

A Yes, it is.

Q Do you recall reviewing and signing under oath a document called supplemental response of plaintiff,

Mary Margaret McDonnell Murphy, to first set of Rule 33 interrogatories propounded by the Defendant New York Stock Exchange in this action?

A Is that the interrogatories -- you used so many words -- was it the int -rogatories?

Q Yes.

A I did sign those.

Q I did use a lot of words because Mr. Beebe may make me say more words if I used less.

Let me show you the response to interrogatory No. 1C and ask you, after reading that if your recollection is that you still received only $700 interest from your loan to Sean.

A (Examining) This says I received more.

Q How much?

A It says I received $1,166.02.

Q Do you recall that now any better after reading it?

A No, I don't, becasue I remember what I did with the money. That's why 700 is in my mind.

Q Take a look at the last page of those interrogatories, Mrs. Murphy. Did you sign that last page?

A I did.

Q Did you do it before that notary public that has stamped it and so certified?

A I did.

Q Now, you say you didn't do that before Jane Foley, who notarized your application to the New York Stock Exchange to become a subordinated lender, did you?

A That is correct, I didn't appear before Jane Foley.

Q When you read that or when you signed that application to become a subordinated lender, did you see that below the signature a notary's affirmation was called for?

A At 6 o'clock in the morning I signed where it said X.

Q You didn't read anything?

A I didn't read a word.

Q Well, then I'm puzzled, Mrs. Murphy, that you are not reading a word because the Receiver's Exhibit A, which is filled out in handwriting, shows that you must have read some words to be able to fill in the blanks,doesn't it?

A Well, I don't know that I filled that out that morning. Who knows whether it was filled out then

or not?

Q I thought you testified yesterday that you did sign both of these, Exhibit 1, I believe, and Exhibit A, at the same time when Mr. Stein was questioning you.

MR. BEEBE: Objection, your Honor.

THE COURT: Sustained.

Q What is your recollection about when you signed Exhibit 1 and when you signed Exhibit A, the Receiver's Exhibit A?

A What I was trying to look at yesterday was to see if they were the same pens and whether they were signed the same day.

Q What is your recollection about whether they were or they weren't?

A I signed some documents.

Q Do you know when you signed Exhibit 1?

A I'm not definitely sure.

Q Do you know when you signed Exhibit A?

A No.

Q Take a look on the second page of Receiver's Exhibit A, Mrs. Murphy. Do you see the answers that are filled in to question 8 there, where you said -- where the application says that from September of 1940 to June of 1948 you attended the Convent of the Sacret Heart,

New York City. Is that in your handwriting?

A That is in my handwriting.

Q How about below, the Convent of Sacred Heart in New Groton, Connecticut?

A That's my handwriting.

Q Did anyone else know those dates and times at McDonnell & Company to be able to complete that information?

A I believe they could have.

Q But you did in this case?

A That is in my handwriting; some of the rest of it is not.

Q What else is in your handwriting on Exhibit A?

A Do you want to go from the very first page?

Q Yes. You can just tell me the lines and the information.

MR. BEEBE: Excuse me, is this exhibit in evidence?

THE COURT: Yes, it is.

MR. BROOKS: We don't know whose handwriting it is yet.

THE CLERK: No, it's not, your Honor.

MR. BEEBE: I would object to a long pursuit of questions unless you are putting it in evidence.

I have no objection to it going in evidence.

THE COURT: Let's get past that.

It is received in evidence.

(Receiver's Exhibit A was received in evidence)

MR. BEEBE: Did he offer it in evidence?

MR. BROOKS: Do you wish to offer it, Mr. Stein?

MR. STEIN: I'm just trying to go back over my recollection of yesterday afternoon. It was my intention to do so.

THE COURT: If everybody is agreed it should be in evidence.

A Line 1 is not mine; one word on line 2 is mine; two words on line 3 is mine; 5 is not, that is not my handwriting.

Q Go ahead.

A Line 5 is not; questions 7 and 8 are in my handwriting; I believe 9 is, it looks like it; 10 is not, A, B or C, none of 10; none of 11 is mine; 11B is mine, not 11A; none of that long list of questions that are all answered, that's not my handwriting.

Q Now, how long would it have taken you to complete the answers that are in your handwriting,

Mrs. Murphy?

A The answers that are in my handwriting would have had to -- well, particularly question 8 would be hard to go back there, and 11B I would have had to have done with my husband because I couldn't make up that sentence.

Q Well, if you had signed Receiver's Exhibit A on that morning that your chaufferu came, you must have spent a good deal more time at it than you say the two or three minutes.

A That's why I know I couldn't have filled it in that morning.

Q I see.

A I could have signed it.

Q You could have signed it. Do you recall when you would have then filled it in to supply that information?

A I've tried for two years to remember this document and I cannot.

Q Were you certain you only spent two or three minutes with those documents that the chauffeur brought?

A It was just a matter of him opening an envelope and I signed them where the X's were and I handed them right back to him.

Q You don't know why Exhibit A got filled out and signed by you as well; is that your testimony?

A I don't know when I filled it out.

Q Do you know why?

A Do I know why?

Q Yes.

A Now I do. I didn't then.

Q Tell me why now.

A Because this is information that they are asking about me, a personal history.

Q Before they could complete the final form, I suppose.

A I didn't know that.

Q You testified yesterday in response to a question by Mr. Beebe the value of your account in January of 1969 was $350,000; do you recall that?

A Can that be re-read to me?

(Question read)

A I don't recall Mr. Beebe. I recall Mr. Stein's questioning about the account. I don't remember what Mr. Beebe said to me.

Q Let me read you back then that testimony and try to refresh your recollection.

MR. BEEBE: May we have a page reference?

MR. BROOKS: Surely. It's 63 of yesterday's transcript.

Mr. Beebe on direct questioning:

"Q What was the value of your account when it was subordinated in January 1969?

"A I believe the account was worth $350,000."

MR. BEEBE: I object. The language is precisely in my copy, "I believe the account was worth around."

I object to that reading.

Q As Mr. Beebe has objected, Mrs. Murphy, do you recall that question and giving that answer?

A I do recall it.

Q Is that your recollection today?

A Yes, that it was around those figures.

Q Do you recall anything about a debit in your account at that time?

A I didn't know anything about a debit then.

Q Do you know what a debit is?

A Well, I do know now what a debit is.

Q What is a debit?

A I'm sure I wouldn't say it right, but if you borrow money against your account, they mark it as a debit.

Q It's a subtraction, isn't it, in simple terms?

A That's right.

Q And there was a debit in your account at the time, wasn't there, Mrs. Murphy?

A I know that now.

Q What was the debit, do you know?

A I don't remember what it was.

Q Was it substantial?

A I don't remember.

Q Well, take a look at Exhibit 2 that Mr. Beebe offered in evidence yesterday, particularly line 8, which is above your signature.

A Above my signature?

Q Your signature is at the end of the exhibit. After reading line 8 does it refresh your recollection on the amount of the debit in your account at the time you subordinated it?

A I can't read on this the numbers.

Q You can't?

A It looks like 51 and then the last two looks like ten. There is another number in there which I can't read.

Q How about $59,000 for the first number and some odd dollars after that.

MR. BEEBE: Your Honor, I have no problem with my copy.

THE COURT: Let's use it then.

MR. BEEBE: I have $59,810 written in.

Would you like to use mine?

MR. BROOKS: It's not better than mine, but it may be Mrs. Murphy could read it.

MR. BEEBE: Well, I could read mine.

Q Does that appear more legible to you, Mrs. Murphy?

A Yes, this is more legible.

Q And can you read the number now to the jury?

A $59,810.

Q And that was a subtraction from the value of your account, wasn't it, at the time you subordinated it?

A I guess. I don't know.

Q How about reading on then in that line 8. Tell me what this financial supplement says the value of your account was. Do you see a figure there?

A Yes. 282,623.

Q And what is that figure given for? What does it represent?

A The market value of the securities.

Q Do you understand that line to then have a subtraction from that market value of the debit balance of the $59,000?

A Do I understand it to mean what?

Q Do you understand that the value of the account, $282,000, has from it subtracted $59,000 to get the real value?

A It appears to be that.

Q And that 's quite a long way from $350,000, isn't it?

THE COURT: Objection sustained. It speaks for itself.

Q Did you know about the debit balance before you testified yesterday?

A I knew I had a debit balance, yes.

Q When Murray McDonnell called you on or about February 4th to ask you to subordinate your account, what did you say?

A He said they wanted to borrow my account for a short period of time for an underwriting and that Rick Olney would call me later in the day and I said, "All right."

Q When you said "All right" did you mean all right, you would lend your account?

A I meant all right, I would talk to Rick Olney later.

Q But not that you would lend your account?

A He didn't -- he didn't phrase it in that way. Rick Olney was going to tell me about what they wanted.

Q Did Murray McDonnell say why they wanted your account?

A I believe he told me it was for an under-writing.

Q What did that mean to you?

A Not very much.

Q Did you understand just that the end result was that they needed more capital?

A No, that's not right.

Q Was this the same reason your brother Sean had given in 1965 or '66 for the loan that he requested?

A That's right.

Q Didn't you think it strange that Murray had to call to say they wanted this and tell you that somebody else would call to ask you for it?

A No, I didn't think it was strange. Murray and

I had never discussed McDonnell & Company in any way at all.

Q Just discussed family and social matters?

A That's right.

Q Why didn't you discuss business matters with him?

A Just never did.

Q Did you discuss them with Jim?

A No, not then at that time at all, no.

Q But later?

A In August of 1969.

Q And Morgan, did you discuss business matters with him?

A Never before, no.

Q Did you discuss them with Morgan later?

A Yes.

Q Did you ever discuss them with Murray?

A Business to this day?

Q Yes.

A No.

Q You testified yesterday you believed what you had been told -- and I am quoting from page 47, line 10, you testified "I believed what I had been told, that it was in good shape and they just would like to

borrow my account."

Who told you that McDonnell & Company was in good shape?

A My only conversation about McDonnell and Company at that time was Rick Olney.

Q But my question is, who told you that the firm was in good shape? You didn't tell us yesterday that Rick told you that.

A Could you read me what I said again?

Q Surely.

"I believed what I had been told, that it was in good shape and they just would like to borrow my account."

A That was Rick Olney.

Q So he also told you the firm was in good shape?

A He told me that -- well, maybe I've used wrong words there. He told me that there was no way I could lose my account, that they just wanted it for a short period of time, just really what I said before. Maybe I shouldn't say that somebody used those words specifically "good shape."

Q I just wanted to make sure what your testimony was.

Now, tell me what you understood Rick Olney's function was at McDonnell & Company at about the time he called you to discuss the subordination of your account.

A Well, one thing that I know Rick Olney did was to handle the McDonnell, or some of the McDonnell accounts.

Q You mean family member's accounts?

A Yes.

Q And did he handle the Murphy accounts?

A Yes, he did.

Q Do you know whose accounts other than the Murphys that he handled who were also McDonnell family members?

A I don't know.

Q Do you know whether he did anything else?

A No, I don't know what else he did.

Q When Mr. Olney told youthe chauffeur would be over the next morning with the documents, did you ask him for a little time to study them?

A No, I didn't.

Q Yesterday you testified, at page 37, that you weren't sure whether there were one or two conversations with Mr. Olney. Do you recall that?

A Yes, I do recall that.

Q Tell me why you are uncertain about that.

A I am uncertain about it because I don't know whether the chauffeur came the next morning from the first -- when Rick called me in the afternoon I don't know whether it was the next morning or the following, whether Rick called me the second day and said the chauffeur will be out tomorrow morning.

Q There could have been a day's interval?

A There could have been a day's interval. If there was, I think Rick must have called me back.

Q What do you think happened?

A I think the chauffeur came the next morning.

Q There weren't two calls?

A Yes.

Q Why are you uncertain?

A I think there weren't two calls. I think because of my conversation with my husband that the cuauffeur came the next morning, but I can't really swear to that.

Q If I understand your testimony, Murray told you nothing about the firm?

A That's correct.

Q One way or the other?

A That's correct.

Q Whatever was said about the firm, the paintings, and the stock exchange seats, was from Rick?

A That's correct.

Q When your husband suggested that "Maybe we better check into this before you enter this transaction" and you said, in substance, "What's the matter, don't you trust my family?" who were you relying on when you were referrring to "my family"?

A Well, I was relying on the fact that Rick was acting as a spokesman for Murray, and that what I was being told was the truth.

Q But when you said "Don't you trust my family" if I understand your testimony what you meant was that you believed that Rick was really Murray, or his agent, so to speak?

A That's right.

Q What Rick told you was really coming from Murray?

A That's right.

Q When you said "Don't you trust my family" you were really saying "Don't you trust Murray"?

A I guess basically that's probably right.

Q How about Morgan? Did you mean him, too?

A I didn't have any dealings ever with Morgan.

Q You knew he was vice president of the firm?

A Excuse me, I didn't know what his position was.

Q Did you know that he was an officer?

A No, I did not know.

Q Did you know he worked at the firm?

A I knew he was an employee of the firm.

Q Did you mean when you said to your husband "Don't you trust my family?" to include Morgan in that family?

A It was just a statement. I didn't include or exclude anybody.

Q Rick Olney is not any part of the McDonnell family, is he?

A No.

Q When you agreed to subordinate your account and signed the documents, did you have any understanding of the benefits you would get from going ahead with that transaction?

A I don't believe there was any discussion of benefits.

Q Did you have any understanding one way or the other? Was there something in this -- Margaret Murphy, were you getting anything out of this loan?

A I did not do it for that reason.

Q Why did you do it?

A I was asked a favor.

Q So that you really didn't know one way or the other whetheryou were getting --

A I didn't go into it to get something out of it. I was asked "Will you do me a favor, will you help me?"

Q Aside from that, did you understand that you would get any monetary compenstaion for doing it, as you had with your brother Sean a few years before?

A I don't remember that.

Q Thereafter, did you get any monetary compensation from the transaction?

A No, I lost everything.

Q Before you lost everything, so to speak, did you get any interest for the loan you made?

A I don't believe there was anything paid.

Q You don't believe so?

A I don't remember anything.

Q How about the dividends on the securities that were subordinated? Did you continue to receive those dividends?

A I never took the dividends from my account.

There was a time in the very end there in the mish-mash and mess of everything that I did receive some dividend checks, but for 30-some odd years I never received a dividend check.

Q For 30 years?

A Up until just the last couple of months I never received a dividend check.

Q Was that because the dividends were simply credited to your account?

A That's right.

Q But you did borrow from the account to build up that 50,000 or so debit balance, didn't you?

A I don't know quite how that whole debit happened. I know I took some money to help build our house.

Q Yesterday Mr. Beebe asked you a couple of times, at page 35 and 41 of the trial transcript, in substance, whether you had loaned money to McDonnell & Company. I just want to be clear on this. You didn't loan any money to McDonnell & Company, did you? You let ehtm use the account that had securities in it that was at McDonnell & Company, did you not?

A Can you re-read what you were saying to me?

Q My question?

A Yes.

MR. BROOKS: Mr. Reporter.

(Question read)

A That's correct.

Q When you agreed to the subordination transaction on or about February 4, 1969, did you know whether your mother was a subordinated lender to McDonnell & Company as well?

A No, I didn't.

Q How about your sister-in-law, Marjorie McDonnell, Murray's wife?

A No, I didn't.

Q How about your sister Ann?

A No.

Q Did you know whether Morgan was a subordinated lender to McDonnell & Company?

A No.

Q Did you know whether Murray was a subordinated lender?

A No, I didn't even know the word "subordinated."

Q Did you know whether Sean's estate had any interest in McDonnell & Company at all of a financial nature?

A I knew that Sean's estate had been left, I

think the right word is in McDonnell & Company, was to have been left for a period of time after his death. I don't know how long.

Q Did you know whether it was still in McDonnell & Company on or about February 4, 1969?

A No, I didn't.

Q Have you subsequently found that out?

A Yes, I have.

Q And what would be the answer, looking back now?

A Pardon me?

Q Do you know now Sean's estate was in McDonnell & Company on February 4, 1969?

A Yes, I do know.

Q On February 4, 1969, when you agreed to and signed the subordination agreement do you know whether your mother and your sister-in-law Marjorie McDonnell had on January 30 deposited over a million dollars in subordinated securities?

A No.

MR. BEEBE: I don't think it's been established she signed it on February 4.

MR. BROOKS: It's the date in the document.

MR. BEEBE: The testimony is to the

contrary, that it was the end of January.

THE COURT: Rephrase the question to tie the document to a relative period of time.

MR. BEEBE: If the same question is asked without the date I would be satisfied.

MR. BROOKS: I believe Mrs. Murphy testified yesterday she did sign those documents on February 4.

THE WITNESS: On or around February 4.

Q If there is some doubt in your mind, Mrs. Murphy, let's go back to your interrogatories. The answer to interrogatory No. 1, interrogatory No. 1, in substance, asks "State the date when you executed any agreemnet by which you subordinated your securities.

"A February 4, 1969."

Please review that and see if your recollection is any better.

A Do we know what day of the week February 4 was, when it was?

Q Mrs. Murphy, my only question is, after reading the answer to interrogatory No. 1A, is your recollection any better as to the date you signed the subordination agreement dated February 4?

A I believe it was on or about that day.

Q That answer is under oath, isn't it, that

answre to the interrogatory? We just looked at that, didn't we?

A It says that -- you are asking me under oath what's my best recollection, and I am telling you.

Q Did you give any care to the answers to these interrogatories when you signed that oath?

A Did I sign this under oath?

MR. BROOKS: No. Would you read back the question, Mr. Reporter.

(Question read)

A When you sign a paper before a notary, are you under oath? I didn't swear to anything.

Q Mrs. Murphy, I am going to read to you what I have referred to as an oath:

"State of New Jersey, County of Hunterdon:

"Margaret McConnell Murphy, being duly sworn, deposes and says that she is one of the plaintiffs in the above entitled actions, that she has read the foregoing plaintiffs' supplemental response to the New York Stock Exchange first set of interrogatories, that she knows the contents thereof, and that the same is true of her own knowledge, save and except those matters stated on information and belief, and as to those matters she believes them to be true."

Q Now,I will represent to you that your answer February 4, 1969, is not one of those matters stated on information and belief. Do you recognize that as an oath, Mrs. Murphy, that I just read?

A I do not recognize that as an oath.

Q It continues:

"Subscribed to and sworn to before me this 26th day of February, 1974." And there is the signature of a notary public.

Did you swear and subscribe to that answer before the notary public?

A No, I did not. I took it to him and I signed it and he signed it.

Q I see. You didn't swear to it.

A No, I did not.

Q Is your testimony now as it was in these interrogatory answers, that you signed your subordination agreement on February 4, 1969?

A It was on or about that. I am not sure as to the date.

Q What do you mean on or about?

A Well, it was around that time. I don't know whether it was exactly February 4 or not.

Q How far away could it be?

A Days.

Q How many?

A Somewhere from January 30 to February 4.

Q No earlier than January 30?

A January 28 to February 4.

Q No earlier than January 28?

A I don't believe so, no.

Q No later than February 4?

A I am not sure.

Q Are you sure aboutthe other details you have been telling us about this transaction?

MR. BEEBE: I object.

THE COURT: Sustained.

Q In any event, when you did sign the subordination agreement did you know that your mother and your sister-in-law had also subordinated over a million dollars?

MR. BEEBE: Objection. Asked and answered.

THE COURT: Overruled. You may answer.

A No, I didn't know.

Q You didn't know?

A I did not know.

Q Did you have any conversations with your mother about the subject of subordination in or about

this time?

A Never.

Q You never talked to her about it?

A No.

Q Did you know she was a subordinated lender to McDonnell?

A No, I didn't.

THE COURT: Mr. Brooks, are you going on to something else?

MR. BROOKS: Yes.

THE COURT: We will take our first of two recesses this morning.

We will be in recess until 11 o'clock. We will sit until 1:30, and you know, and we will take two recesses.

(Jury excused)

THE COURT: Now, Mr. Beebe, what was the matter you wanted to call to my attention?

MR. BEEBE: Our next witness, as the other side knows, is Mrs. Anna McDonnell, the older lady, who is too ill to appear and testify in person. Her deposition has been taken.

THE COURT: I take it there is no disagreement with the fact that the deposition may be used

at this trial?

MR. BROOKS: No disagreement. We plan to do the same in effect in cross-examination.

MR. BEEBE: That is exactly why I wanted to go through the procedure. All objections were preserved at the taking of the deposition.

THE COURT: Everything except as to form.

MR. BEEBE: Right. This becomes very important. If I could hand your Honor a copy --

MR. BROOKS: We have filed a copy of the deposition. I will hand it to the Court.

THE COURT: Thank you.

MR. BEEBE: I could direct everyone's attention to page 91. There were a lot of questions asked at this deposition about what Mrs. McDonnell was told and wasn't told, and so on, at the time she was asked to subordinate, which was as you will see around the same time as Mrs. Murphy. And then comes a hypothetical question. I will read starting on line 16, the first part I have no trouble with, but to put it in context with "Mrs. McDonnell, when Murray requested the additional deposit of 800,000 or whatever the amount was, did you hesitate at all in complying?

"A No."

Then comes the hypothetical, by Mr. Brooks:

"Would that have been your usual practice had it not been Murray calling?

"A Any child had what they wanted if I could give it to them, help them out."

My problem with that is that even in context, and certainly out of context, it looks like she just did anything that Murray or anyone else asked her, no matter what she knew, and the hypothetical, even taking it as a hypothetical for whatever value it has as it is, is very badly and unfairly loaded. It doesn't have in it the important facts that she wasn't told. What I would have done, if I had been Mr. Brooks, or if this had been -- if she had been here on the witness stand, I would have asked her "Were you told all the bad things that were going on, and if you had been told all of those would you have given him the money knowing full well that you were writing it off and giving it all away, your inheritance and the children's inheritance was gone?"

So it's a loaded question, it is an unfair question, and it's I think a very damaging and misleading question, and there is plenty of other ammunition in here for Mr. Brooks as to what was or wasn't told her, and what she did and didn't do at the time. That is my

objection.

MR. BROOKS: May I be heard?

THE COURT: Sure.

MR. BROOKS: As you must know, this point is a very important one in our defense. Mrs. McDonnell was represented by Mr. Beebe's firm at this deposition. There was no objection. I think the objection now being raised is an objection to form, and they cannot produce the witness so I can ask my other question, and I think it would be highly prejudicial to exclude this testimony, and I don't think it's excludable since they waived their objection as to form. Mr. Beebe has said it's a loaded question. That is a question as to form. If it was loaded Mr. Beebe had this occasion to make his objection. If he did, I could have asked it another way. But now I cannot.

THE COURT: Mr. Beebe, I'm not so sure this question is as injurious to you as you contend.

MR. BEEBE: It's already been quoted back at me in opening statements.

THE COURT: I know. But I would assume your argument would be that this only means usual practice having been told, that everything was on the up and up. There is no statement in there that she has a practice of giving away funds where she knows she is going to lose it all. I don't see the damage to you in this.

I do feel that the question is not improper, the question of whether she had a practice with members of her family. She said she had a practice.

Whether the answer goes to the damaging extent you indicate or the jury is going to conclude is a statement of the mother that she would help the kids out when she could help them out and that's it. I suppose it's a matter of argument.

Let me think about whether this is excludable. But I frankly don't see the answer -- I can see the argument that they are going to make from it. I'm not so sure that it goes to the utterly destructive lengths that you seem to fear by objecting to it.

MR. BEEBE: Maybe I overstated my case.

If I may, your Honor, just one more thought on this. I am going to spend a lot of time undoing whatever damage, even though it's not totally destructive, that this silly hypothetical has been used for.

Why raise a lot of arguments, is my problem, which I think are peripheral to what this case is all about? It's a trouble I have had with the way the trial is going, too, that a lot of these peripheral things are coming in.

THE COURT: I can't quite agree with you about the silly hypothetical. I think to ascertain whether she had a practice is a fair question. The answer probably should have been explored more along the way. I don't really find any great fault with the question, and I really don't find that the answer that was given was other than what I would expect a mother to give, given her circumstances.

MR. BROOKS: Let me point out there was none or hardly any cross-examination. There was some cross-examintion, however, but not on this point.

THE COURT: Let me give consideration to this. Obviously we are not going to get to this until you have read your portions of the depositoin and that

will give me time to consider it further.

MR. BEEBE: I might just read it in.

THE COURT: I take it you are not going to read it.

MR. BEEBE: I must say I am somewhat persuaded by what you say. Perhaps thera are two ways of looking at that and it's not anywhere near as damaging as I had thought. I hadn't focused on the usual practice way of looking at it. If I don't read it I will object to it when it comes up. If I read it then it's obviously not objected to.

MR. LOFLIN: There are probably two other matters that might be taken up at this time. One of them relates only to me and one we have in common.

My question on behalf of Amex is whether or not any of the testimony of the present witness, Margaret Mary McDonnell Murphy, is being entered in this record against the American Stock Exchange. As the Court is aware, we are in the process of trying two cases. Mrs. Murphy's case is not directed against the American Stock Exchange. We are not a defendant in her case. We are a defendant in the other case brought by James and Anna.

I really need to know whethr or not

Mrs. Murphy's testimony is being offered for any purpose relevant to the American Stock Exchange.

THE COURT: Mr. Beebe, can I put that to you?

MR. BEEBE: Sure. I think the answer to that is that some of it obviously bears, when they ask questions, not necessarily ones that I elicit, as to what her mother, who is an executrix of the other case, which is against the Amex, was told and wasn't told, and told her, what she was told and wasn't told. And to the extent that the other case of Jim and the mother and the trust, which are against the Amex, are intermingled, it goes against Amex. But I'm not going to ask her any questions, for instance, as to what she was or wasn't told by the Amex, partly because I know what the answers are but partly because, as you say, it's irrelevant to her case against the other parties.

MR. LOFLIN: Based on your statement I have to conclude that you intend to use some parts of her testimony against the Amex and under those circumstances I may have a few questions on cross-examination.

THE COURT: Very good.

MR. BROOKS: We have one more complaint and perhaps we can approach the bench.

(At the side bar)

MR. BROOKS: Juror No. 4 has been observed by counsel to be dozing a number of times. We have some concern as to whether she followed the evidence. I would suggest that perhaps an inquiry by you might be appropriate to see whether she has been and whether she feels she has a grasp of the case.

THE COURT: Let me make my own observations and see what we do.

MR. BEEBE: Could I support that, your Honor?

THE COURT: All right.

(Recess)

(In open court; jury present)

CROSS-EXAMINATION CONTINUED

BY MR. BROOKS:

Q Mrs. Murphy, will you take a look at Plaintiffs' Exhibit 2, which should be on the table in front of you, which is the financial supplement to your application. Take a look at line 8, particularly the last sentence which reads:

"The subordination of my claim will expire 100 days' notice."

Do you see that there on line 8?

A Yes, I do.

Q Did you know that your subordination would expire a hundred days' notice?

A No, I didn't.

Q Do you know it now, that it would have?

A It's right here.

Q Aside from it being right there, did you acquire any knowledge of that fact before I pointed it out to you?

A What I have learned to understand is that if your account is subordinated, it cannot be un-subordinated unless the capital ratio of the firm is what it has to be.

Q Did you come to that understanding from reading the subordination agreement?

A No.

Q Did you ever read the subordination agreement to determine whether that was true or not?

A No, I didn't.

Q Did you ever consult a lawyer before McDonnell & Company went into liquidation to consider the question of whether the subordination could be terminated?

A No, I didn't.

Q Did you ev er ask the New York Stock Exchange whether it could be terminated?

A No, the only person I ever asked was Paul McDonald.

Q Now, as I recall your testimony you said that you didn't read any of those documents before you signed them when the chauffeur brought them that morning; am I correct?

A That is correct.

Q Was that your normal practice, not to read documents concerning a financial transaction before you signed them?

MR. BEEBE: Objection, your Honor.

THE COURT: Yes, sustained. There is no foundation aa to any practice or otherwise.

Q Mrs. Murphy, do youhave a checking account?

A I do.

Q Who keeps the balance in that account?

A The balance in my checking account, who keeps it?

Q Yes. Totals it up, subtracts, adds, comes out with the balance?

A The bank.

Q You don't do that at all on your own behalf?

A I take their figure.

Q Do you keep any money balance of your own at home in your checkbook?

A At the beginning of the month when they tell me what I have left, I then subtract pretty much as I go along what I've written out.

Q Well, do you have any charge accounts in department stores?

A I do.

Q When you get presented with a sales slip for the purchase of a dress or two to sign your charge slip, do you read it to make sure youare not being over-charged before you sign?

A I look at it when it comes into the house in the form of a bill.

Q How about any department store where you write down your name; do you look at it?

A I will briefly glance at it.

Q To make sure you are not getting charged too much; is that right?

A That's right.

Q How about general charge accounts. like American Express or Diners' Club, do you have any of those?

A I don't have those, no.

Q You don't have any of those. Well, who pays the bills in the family, the fuel bill, any periodic bills that come into any household, who pays them?

A I pay the bills.

Q Do you read them before you pay them to see if they are accurate?

A Pretty much so.

Q Okay. Now, I take it then it's not your practice to sign your name or to commit yourself financially without at least making a review of whether you are being properly charged; is that correct?

A As far as my monthly bills go.

Q And those charge slips in the department stores.

Now, did you make any review like that when you signed these subordination documents?

A No, I didn't.

Q Why not?

A Well, first of all, it was very early in the morning. The chauffeur was standing there waiting to leave my house. Even when I read them now I still don't quite understand what they all mean.

Q Did you ever sign a document before that you

didn't understand what it meant in connection with a financial transaction?

A I don't recall.

Q Now, Rick Olney told you, as I understand it, that the stock exchange seat or seats of McDonnell & Company, the paintings on the wall and the furniture would secure or stand ahead of any claim on your securities; is that correct?

A Well, he never got that technical. I said, "Was there any risk?" and he said, "No, there were no risks." We didn't get into claims or anything.

Q Didn't you testify about the seat and the paintings and the furniture?

A He said that they could sell the two seats on the floor of the exchange, the paintings on the wall and the furniture to pay me back. We didn't discuss anybody else.

Q Now, do you know whether that's true or not, whether they could sell those assets to pay you back?

A I believed that it was true.

Q Do you know whether it was true or not?

MR. BEEBE: Objection, your Honor.

THE COURT: Yes, sustained.

Q You have also testified that Rick Olney told

you there was no risk; is that right?

A That's right.

Q Can you tell me exactly what his words were as best you recall?

A I said, "Rick, are there any risks involved in doing this? "

He said, "No, there are no risks involved."

Q Do you believe that was not Rick Olney's true opinion at that time?

MR. BEEBE: Objection, your Honor.

THE COURT: Yes, sustained.

Q Do you have any knowledge to lead you to believe that that was not a truly held belief of Rick Olney when he told you that?

MR. BEEBE: Same objection, your Honor. I don't know why we are talking about her present belief as to what happened then. Mr. Olney's opinion I think is completly irrelevant.

MR. BROOKS: What I would like from the witness is any fact, any knowledge she can tell us that leads her to believe that Mr. Olney did not truly believe the advice or the fact he stated to her.

THE COURT: How is that relevant to these issues at this point? Her testimony is that's what he

told her and at that point she said she believed him.

MR. BROOKS: Yes, but her claim here is for misrepresentation. If Mr. Olney really believed what he told her I don't think there was any misrepresentation. I'm asking her does she know any reason to doubt it.

MR. BEEBE: Your Honor, I think the facts are what are involved here.

THE COURT: I think so, too. Sustained.

Mr. Brooks, that doesn't mean you can't inquire as to what she knew from any other source or facts. The objection only goes to this particular question.

Q Mrs. Murphy, yesterday when Mr. Beebe introduced Plaintiffs' Exhibit 3, he asked you a few questions about a page that is part of it with the number 01944 on the top of it. Would you find that, please, in the copy of Plaintiffs' Exhibit 3 in front of you. It's toward the back.

A What is the number again?

Q It's got 01944 on the top and it's a letter dated February 3, 1969, from Thomas McKay to the Division of Finance, Department of Member Firms, New York Stock Exchange.

Since it's in evidence,may I read it, your Honor?

THE COURT: You may.

(Plaintiffs' Exhibit 3 in evidence was read to the jury)

Q My question is was this page part of the subordination agreement that was delivered to you by the chauffeur?

A I don't know.

Q Have you ever seen it before?

A No. I read it here yesterday for the first time.

Q After Sandra McDonnell came to your house in the spring of 1969 and told you that McDonnell & Company was in serious financial condition, did you ever call Murray to inquire about that statement of hers?

A No, I didn't.

Q Yesterday you testified that in response to Mr. Beebe's question, thereafter did you ever contact somebody at McDonnell & Company, and that's in substance, and your answer was yes, later on. Was that contact with Rick Olney to inquire about Sandra McDonnell's advice to you, that the firm was in serious financial condition, or was it for some other reason?

A Well, what I best remember is asking Rick Olney to transfer stock to the charitable organization

in New Jersey. I don't at that point remember discussing the condition of McDonnell & Company with him.

Q So if I understand you correctly, the contact that you had with Rick Olney after the Sandra McDonnell told you McDonnell was in serious financial condition, was not an attempt by you to verify or have denied that statement; is t hat correct?

A I could have; I don't remember.

Q I take it you called no one else shortly after having Sandra tell you that the firm was in serious financial condition to explore that problem, did you?

A Call somebody in McDonnell & Company?

Q Yes.

Q Rick would have been the one I would have called.

Q We are not sure what you asked Rick in that call you told us about yesterday; is that right?

A Yes.

Q How about anybody else? Did you call anybody else?

A I don't recall.

Q Did you think of calling a lawyer?

A No, I didn't.

Q Did it alarm you?

A Yes.

Q You testified this morning in response to Mr. STein's questions that during the summer of 1969 you had telephone calls or conversations with both your brother James and your brother Jim about the condition --

A They areboth the same.

Q Excuse me?

A You said the same person twice. You said James and Jim.

Q I'm sorry, Morgan and Jim. Thank you.

A I did talk to them.

Q Throughout the summer?

A No. It was in August.

Q How about July?

A Not that I recollect. My first recollection is August.

Q Were you at your home in July in Jersey?

A Yes, I was.

Q How about August?

A No, I was not.

Q Can you recallany of these telephone calls, spreicially telephone call by telephone call?

A I can recall generally what the calls were about.

Q All right. Tell me what you recall generally.

A Well, one call, Jim asked me if he could represent my interests in the firm, personally represent me and I said yes, he could. That was one call.

Another call was about -- well, very often the calls were about how the firm was doing.

Q And how was it doing?

A Not very well at all.

Q Poorly, wasn'tit?

A Very poorly.

Q Tell me a little bit more about Jim's request to represent your interests. What did he mean by that, if you know?

A Well, there wasn't anybody that cared particularly about me at this point.

Q Jim volunteered to represent you in that respect?

A Right. I had been taken into this deal and left hanging there. So Jim said could he represent me, and I said that certainly he could.

Q Did he say he was representing anybody else?

A I believe he said he was representing my mother then.

Q Anyone else?

A Not that I remember.

Q Where was Murray McDonnell at that time?

A In August?

Q At the time Jim asked to represent you and said he was representing your mother?

A Well, as I remember, he was rather hard to find at that time.

Q But he was still an officer of McDonnell & Company, was he not?

A I believe so.

Q How about Morgan McDonnell, was he an officer of McDonnell & Company?

A I don't know whether Morgan was an officer.

Q Well, what was he doing at the time you talked to him about the firm?

A He was in New York at the firm, I believe, at that time.

Q Didyou sign any paper to authorize your brother Jim to represent you?

A I don't believe so.

Q Do you know what he did on your behalf in representing you?

A Not specifically.

Q Did he ever render a report to you of his

representation?

A He talked to both me and my husband during that month.

Q You feel he kept you fully informed aboutthe doings of the firm?

A I do.

Q And its condition?

A Yes, I do.

Q Was he in New York at the firm at this time?

A He had been in New York for a while. I don't remember exactly when he came into New York. It was during the summer sometime.

Q Did you feel he had sort of firsthand on-the-scene experience to relate to you?

A I felt very secure with Jim there, yes.

Q Now, when you met with Paul McDonald prior to signing or authorizing your husband to sign Plaintiffs' Exhibit 4, which is that September 30th letter discussing the reorganization of McDonnell, what did he tell you about the firm's condition?

A Paul McDonald was telling us what they were doing inthe firm to try and straighten things out and said that if they could get some restrictions removed, that maybe they would be able to turn things around.

They had cut back staff and they had tried to move ahead, were trying to move forward instead of backwards.

Q Did he tell you anything about the condition of the firm?

A He told us the firm was not in good condition.

Q Did he tell you whether it was running at a profit or a loss?

A I believe he told us it was still running at a loss.

Q When was the first time you learned that it was running at a loss?

A In the summer, '69.

Q From whom?

A Probably Jim, but I'm not sure.

Q Now, what was the source of these restrictions that Paul McDonald wanted to get lifted so the firm could try to operate more profitably?

A The two that I remember are they were limited in the amount of business they could do in a day and they could not advertise in any manner.

Q How about underwriting, do you recall whether he told you that they wanted to get underwriting restrictions lifted?

A No, I don't recall underwriting.

Q Take a look at the last paragraph in Exhibit 4, wouldyou, Mrs. Murphy, and see if that refreshes your recollection on the question of whether the firm was trying to get underwriting restrictions lifted.

MR. BEEBE: Excuse me, does she need refreshing? I thought that's what she just testified to.

MR. BROOKS: I believe she said she didn't recall about any restrictions. If she does, I'll move on.

(Pause)

A That doesn't do anything.

Q Who did you understand was the restrictor of McDonnell & Company?

A Who had placed the restrictions on McDonnell & Company?

Q Yes. That's a much better question.

A The New York Stock Exchange had put the restrictions on them.

Q Did you have any opinion of Paul McDonald's qualifications for the job that he was functioning in when you met with him?

MR. BEEBE: Objection as to relevance.

THE COURT: Is this relevant?

MR. BROOKS: I believe it is.

THE COURT: In what way?

MR. BROOKS: As I understand the claim here, it will be that the Stock Exchange shouldn't have lifted restrictions like this. I want to establish that the firm under competent and qualified management believed that it was best for the firm to have these restrictions lifted, and that they were going about getting them lifted in a reasonable and proper way.

THE COURT: How does her assessment of Paul McDonald bear on that issue?

MR. BROOKS: It goes to the good faith and the competence of the management, who was sponsoring this program.

MR. BEEBE: I am not sure that is an issue in the case.

THE COURT: You mean Mrs. Murphy's assessment of Paul McDonald bears on the good faith of the management?

MR. BROOKS: And the good judgment of the

management in how to run McDonnell.

THE COURT: Have you established she is competent to testify about what is good management, and what is not?

MR. BROOKS: She may know something about Paul McDonald's background and qualifications.

THE COURT: I will permit a question or two here, but I don't want to get very far into it because I don't think she is competent to give what you are asking.

Q Do you know anything about Mr. McDonald's qualifications?

A I knew nothing about them.

Q You authorized Mr. Murphy to sign Exhibit 4 on your behalf, did you not?

A That's right.

Q As I understand your testimony, Exhibit 4 is a modified version of a prior draft that you had signed on your own behalf; is that right?

A That's right.

Q Did you read that prior draft before you signed it?

A The best that I recall, Paul McDonald explained the letter to us when we sat in his office.

Q By "we" you mean you and your husband?

A Yes.

Q And then you signed?

A He told us we didn't have any choice but to sign that document.

Q And you did?

A I did.

Q Did your husband agree with Mr. McDonald's statement that you had no choice?

A I don't know.

Q Did you discuss it with him?

A I don't remember discussing it.

Q You signed another document somewhat later, which is Exhibit 5, an agreement dated as of October 15th. I believe you told us, told the jury, you signed on the 12th of October. You did that after conference with Tom Ford, a lawyer from Shearman & Sterling, who you discussed the document with first; am I correct?

A That's right.

Q Will you tell me what Mr. Ford said to you, as best you recall?

A I don't recall exactly what was said, but that this was going to be the next step, and again there was no choice.

Q Did he explain to you anything about the tax

consequences of this transaction on you, Margaret Murphy?

A If he did I wouldn't have understood him.

Q That really wasn't my question. Did he explain it?

A I don't know.

Q You have no recollection of that?

A No, I don't.

Q Do you have a recollection of him saying anything else other than what you have told me about so far?

A No, I don't.

Q Before you signed the document, did you have any telephone calls with your brother Jim?

A I did.

Q And who called who?

A I called Jim.

Q What did you say to him, and what did he say to you?

A I said that Murray had just called me and he was on his way over to my house with Tom Ford,and I asked him what it was about.

Q Did Jim know what it was about?

A Yes, Jim did know what it was about.

Q What did he tell you?

A He told me that he didn't like it, but he felt

I was going to have to go along with it.

Q Did he say why?

A I don't remember specifically why.

Q After it became clear to you that your investment in McDonnell & Co. had been lost through the liquidation of the firm, did you complain to anyone who had been in the management of McDonnell & Co. during the time that you made your investment in it?

A You mean after the firm closed did I call somebody in McDonnell & Company?

Q Yes.

A I believe that I tried to get Rick Olney at some point there, and couldn't reach him. I don't think I ever talked to him again.

Q Did you ever talk to your brother Murray about it, other than the conversation you told us yesterday?

A Murray came to my house once, yes, afterwards.

Q And did you ever tell Murray that you believed that you had been defrauded back there in February of 1969, and he probably was the guy that did it? Did you ever tell him anything like that?

A I don't remember specifically what I said to him. I remember what he said to me.

Q I am only interested in what you said to him.

I want to know if you ever complained to anybody about this wrong that was done to you, like Murray, or Rick Olney, or Mergan. Did you ever tell them what you thought of them for this transaction?

A I can't answer that.

Q Did you ever tell the New York Stock Exchange, before you filed this complaint in this action, that you thought you had been wronged by McDonnell & Company, by your brother Murray, or by anyone else connected with McDonnell & Company?

A Before I started this suit?

Q Right.

A No.

MR. BROOKS: I have no further questions.

THE COURT: Mr. Loflin.

CROSS EXAMINATION

BY MR. LOFLIN:

Q Mrs. Murphy, I am John Loflin. I represent the American Stock Exchange, referred to here as Amex.

I would like to know if before you subordinated your account -- that is, the period around February 4, 1969 -- you had any conversations with any officer or employee of the Amex?

A No, sir, I didn't.

Q Did you exchange any correspondence with them in any form? Did you write them or did they write you?

A Not that I ever remember.

Q And after that time, Mrs. Murphy, did you have any contact with any officer or employee of the American Stock Exchange, or did you exchange any correspondence with them?

A Not that I ever remember.

MR. LOFLIN: Thank you.

I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. BEEBE:

Q Mrs. Murphy, you were asked yesterday, I believe, to the effect of whether you were bailing out the company when you had made your subordinated loan of your account at the end of January or the beginning of February. Was it your belief at that point that you were bailing out McDonnell & Company?

MR. STEIN: I object. I think the question is leading.

THE COURT: This is addressed to some cross examination?

MR. BEEBE: Yes, sir.

THE COURT: Overruled.

A I did not believe I was bailing out anybody. I thought I was loaning my money for an underwriting. I did not know the firm was in bad shape.

Q When you made your loan of your account in 1969, the one that is involved here, how much of your account did you loan?

A I loaned my entire account.

Q That is all the stocks that were in it?

A All the stocks that were in it.

Q The earlier loan in 1965, I believe it was -- no, when was the earlier loan?

A I believe it was in 1965.

Q To Sean?

A Right.

Q Did you also loan your account?

A Yes, I believe it was the whole account was loaned then.

Q When you had these discussions in the end of January or the beginning of February of 1969, I would like to know how long each of them lasted. I will start with the phone call from the president of McDonnell & Company, T. Murray McDonnell. How long did that conversation last?

A The best that I recollect, a couple of minutes.

Q And then I think the next one was Mr. Olney called you. How long did that last?

A Maybe five, six minutes.

Q And then you had a talk with your husband. How long was that?

A About a minute and a half.

MR. BROOKS: I object. I don't think this is proper redirect, because it is not directed to the cross examination. It is really just more direct.

THE COURT: Overruled.

Q Was there any conversation with the chauffeur concerning the substance of what you were signing?

A No, there wasn't.

Q There have been some questions on the cross examination about your family. Were you close to your brother Murray in any business sense?

A Not in business sense, no.

Q Did Murray keep you abreast of the business at McDonnell & Company when he was president of it?

MR. STEIN: I object. I think counsel is leading the witness again.

MR. BEEBE: I am just trying to straighten out

the record.

THE COURT: It is leading. You can try to focus her attention in another fashion. Sustained.

A Murray --

Q Excuse me, I'm sorry, but there has to be a question pending. Let me just ask in a general sense: How many brothers and sisters do you have?

A Six brothers and seven sisters.

Q Could you name them for me?

A I will start at the top: Catherine, James, Anne, Charlotte, Murray, Charles, Gerard, Genevieve, Morgan, Shielah, Mary, Barbara, then I came, and my brother Sean.

Q How much older than you was -- what is the age difference between you and Murray?

THE COURT: I think we've had that. Some five years, I think.

THE WITNESS: Oh, no.

MR. BEEBE: I think it was Morgan that that spread was.

A I think Murray would be maybe ten, twelve years older.

Q And when you grew up, were you equally close to all your thirteen siblings here?

A No. The youngest ones were really brought up separately, different. We had our own apartment which was connected, but we didn't do anything with the older ones. We were by ourselves.

Q Who was in the youngest group?

A Sean, Shielah -- maybe no Shielah, but Sean, Mary, myself and Barbara. The last four, five maybe, were.

Q Did Murray live on the same floor?

A No, he didn't.

Q Was there any arrangement whereby the group on one floor communicated with the group on another floor?

A The little ones were allowed to go over to see the bigger ones at night if we had been good, and it didn't happen very often.

Q Were you one of the little ones?

A I was one of the little ones.

Q Where is Catherine living now?

MR. STEIN: I object on the grounds of relevance. It is all very interesting, but I don't know what it has to do with this case.

THE COURT: Sustained.

Q Did you ever make any -- apart from what you have testified to, did you make any decisions involving investments of any kind?

A No, I never made any decisions.

Q There has been some questioning on cross examination about the value of what you had in monetary terms as of about the end of January 1969. Could you pinpoint as precisely as you can what the value was at that time of the various things that were yours?

A I was led to believe that it was about $350,000.

Q What was $350,000?

A The value of my account.

Q And apart from your account at McDonnell & Company, what other things were there, and what was their value?

A I had my home in New Jersey, a piece of -- a small piece of property in Long Island, and my investment in Mercury Partners.

Q Mr. Brooks from the New York Stock Exchange asked you whether you had documents that arrived for your in the mail concerning accounts of your children. Did you have anything to do with making investment decisions for your children?

A No.

Q How long have you been married?

A Eighteen years.

Q As of February, or the end of January, 1969,

did you know of any other lenders or subordinated lenders or capital contributors to the company of McDonnell & Company?

A No, I didn't.

Q When you heard about the problems at McDonnell & Company in the spring of 1969, did you ever attempt to reach Mr. Olney there?

A Many times.

Q What was your purpose in attempting to reach him?

A To ask him what was going on. He would not answer my phone calls.

Q Were you a member in any sense of the McDonnell Company, like an officer, or anything like that?

A No.

MR. BROOKS: That was asked and answered yesterday. The answer was "no." I can stipulate as to that.

MR. BEEBE: I thought some confusion might have entered on cross.

THE COURT: It's been covered.

Q What did you think was the role of the New York Stock Exchange and the American Stock Exchange when you made the -- I will strike the American Stock Exchange -- the

role of the New York Stock Exchange when Mr. McDonnell, the president of McDonnell & Company, called you and asked for this loan?

A I thought the New York Stock Exchange, I believed that they were there to protect people who invested their money in Wall Street very much like when you have a savings account it is protected by the Federal Deposit.

MR. BEEBE: I have no further questions of this witness at this time, your Honor.

THE COURT: Any questions brought up solely by the redirect?

MR. BROOKS: I have some, I think, your Honor.

THE COURT: All right.

RECROSS EXAMINATION

BY MR. BROOKS:

Q Mrs. Murphy, do you know the name of the chauffeur who brought you the documents that morning?

A I think his name is Jerry.

Q Did you ever consider asking him to come back a little later on after you had a chance to read those documents?

THE COURT: How does this bear on the redirect examination?

MR. BROOKS: He asked her about --

THE COURT: How long he was there, that's all

MR. BROOKS: Right. Obviously, counsel would like to show that this was a very brief time, that Mrs. Murphy was rushed.

THE COURT: I sustain an objection to it.

Q Did you ask the chauffeur to return at a later time so that you would have an opportunity to read the documents?

MR. BEEBE: Exact same objection, your Honor.

THE COURT: Yes, sustained.

Q Had either Rick Olney or Murray McDonnell told you that time was of the essence, that you had to sign these documents at 6:30 in the morning and get them right back?

A I don't remember being told that, no.

Q Did you ask why this chauffeur had to come to your house at 6:30 in the morning?

A No, I didn't ask. I assumed that he was on his way out to pick up Mr. McDonnell to bring him to New York.

Q What time did you usually get up?

A About 7:15, 7:30.

Q I take it Mr. Murray McDonnell lives near you.

A He lives about twenty, twenty-five minutes away.

Q You belong to the same clubs as Murray McDonnell?

MR. BEEBE: Objection, your Honor.

THE COURT: This is going way beyond the re-direct.

MR. BEEBE: This was brought out on cross long ago.

MR. BROOKS: Mr. Beebe's redirect attempted to show that Murray McDonnell was just one of fourteen siblings of Mrs. Murphy. I think it is quite to the contrary, because of proximity and the times they see each other.

THE COURT: But this was all gone into by you on cross examination, and his inquiry was directed toward your inquiry. We could go on this way all night.

Sustained.

Q Mrs. Murphy, did you know that you had to be approved by the New York Stock Exchange as a subordinated lender to McDonnell & Company at the time you entered the transaction?

A No, I didn't.

MR. BROOKS: No further questions.

RECROSS EXAMINATION

BY MR. STEIN:

Q Mrs. Murphy, you testified on redirect examination that you have some property on Long Island?

THE COURT: She testified to that on direct examination as well.

MR. STEIN: I just heard it. I wanted to know whether or not that property was located in Southhampton.

THE WITNESS: I said so.

THE COURT: Undeveloped real estated in Southhampton, as I remember.

Q About how many acres, Mrs. Murphy?

A It's not quite two acres.

Q Is it on the water?

A No, it isn't.

Q You have a home in New Jersey which you own jointly with someone or all by yourself?

A I own it with my husband and the First National City Bank.

MR. STEIN: Thank you.

THE COURT: Thank you very much, Mrs. Murphy. You may step down.

(Witness excused.)

MR. BEEBE: Would this be a good time for the second recess?

THE COURT: I intend to go to 12:15.

Ladies and gentlemen, plaintiff's counsel at this point is going to read to you from a deposition which is the sworn testimony of Anna M. McDonnell, who is the mother of the prior witness, and the widow of the founder of the firm.

She is, I understand, some 81 years of age, and, therefore, is unable to be here to testify, and this testimony was taken under oath on the 8th of May, 1973, when all counsel or a representative thereof were present.

MR. BEEBE: Or noticed.

THE COURT: Or noticed to be present.

In other words, given an opportunity to appear.

The testimony was under oath, and Mrs. McDonnell signed it on the 6th of June 1973, before a notary public after it was typed up. It is to be treated just as if she were on the witness stand before you and given the same weight, no more and no less, than if she were actually here.

In order to make it more intelligible and more appropriate for the ear and the eye, the device is going to be used, I gather, that Mr. Beebe will read the questions

and one of his colleagues will be sitting on the stand and reading the answers.

So, Mrs. McDonnell will now take the stand.

MR. BEEBE: May I introduce Mr. Mark Adelsohn, also of the Davis & Cox firm, who will read the answers.

While I am introducing people, I neglected to introduce David Dubin, who is also of the Davis & Cox firm, and is helpingus.

THE COURT: Go ahead.

MR. BEEBE: This was the examination of Mrs. McDonnell by Mr. Brooks:

"Q What is your name?

"A Anna M. McDonnell.

"Q Mrs. McDonnell, is your residence 660 Park Avenue?

"A It is.

"Q Are you married?

"A No."

MR. BROOKS: I wonder if we could have the page references so we can follow along with counsel.

THE COURT: We are now starting at page 3.

In case it was not made evident, these are questions put by Mr. Brooks, who was there at the time

asking the questions.

MR. BEEBE: I will accommodate everyone following the transcript, including the reporter, by any time I make a big skip of a few pages, or something, I will signal that and let you know what it is.

THE COURT: Thank you.

"Q Are you married?

"A No.

"Q Have you ever been employed?

"A No.

"Q Can you tell me when you were born?

"A 1894, December 3rd.

"Q Can you give me a summary of your educational background?

"A My educational background was the Visitation Convent, Brooklyn, 89th Street, Fourth Avenue.

"Q How long did you attend the Convent?

"A I attended through high school.

"Q Were there any particular courses that were offered in the Convent?

"A No. Just regular.

"Q Academic high school courses?

"A Regular academic high school courses.

"Q When did you marry, Mrs. McDonnell?

"A 1916.

"Q What was your husband's name?

"A James Francis McDonnell.

"Q What was his occupation at the time you married?

"A At the time I married he was a member of Byrne and McDonnell.

"Q Would you spell the first name.

"A B-y-r-n-e.

"Q What was their business?

"A Brokerage.

"Q Were they members of The New York Stock Exchange?

"A Yes.

"Q Was your husband a member of the Exchange?

"A No."

MR. BEEBE: I am skipping to page 6, line 6:

"Q Throughout his life, was your husband in that same firm?

"A No.

"Q Can you tell me when he changes his business affiliation?

"A 1917.

"Q What occurred then?

"A He formed McDonnell & Company.

"Q Did McDonnell & Company continue the brokerage business that your husband had been in?

"A Yes."

MR. BEEBE: I am skipping a little down that page to line 21:

"Q Did your husband have any partners in the new firm?

"A Yes, he did have partners.

"Q How many?

"A I am not certain. I could name a few. I can't tell you. He had a brother Hubert and he was a partner, a Mr. Kilburn. R. S. Kilburn and then he took in two more brothers."

I skip to line 9:

"Q Did you become acquainted with any of the affairs of the brokerage business through your husband working in it?

"A No.

"Q Did you become acquainted with any capital to finance the brokerage business that your husband was in?

"A No.

"Q While with Byrne and McDonnell and at about the time he founded his firm, did your husband ever receive capital from your business or you or your family?

"A No.

"Q Mrs. McDonnell, how many children did you and Mr. McDonnell have?

"A You want to really hear? Fourteen.

"Q How many of those were sons?

"A Six sons.

"Q And is James the oldest?

"A Oldest son.

"Q Can you tell me the names of the other sons?

"A James and Murray. Charles, Gerard, Morgan and Shawn.

"Q Did Mr. McDonnell continue his business of McDonnell & Company as a partnership up until his death?

"A He did."

I skip a little down to line 16:

"Q Did any of your sons ever enter the firm as partners?

"A Yes.

"Q Which ones?

"A Murray. T. Murray.

"Q Do you recall when he entered the firm?

"A No, I don't recall.

"Charles.

"Q Any others?

"A No. I am sure nobody else.

"Q Would it refresh your recollection if I suggested that Murray entered the firm in 1945?

"A That would be about the time, after the war, yes.

"Q Did James ever work for the firm?

"A Yes.

"Q What time was his association with the firm?

"A It would be previous -- I don't know -- it must have beenprevious to that. I can't rec all really.

"Q In and about that time, after the war?

"A I would think so."

Then I skip some colloquy, to line 16.

"A Jim remained but a few months in McDonnell & Company and then left.

"Q Did any of your other sons other than James and Murray enter the firm at any time?

"A Yes. Charles. Charles.

"Q Did he become a partner?

"A Yes.

"Q Now, after the firm became a corporation, did any of your other sons enter the business?

"A No.

"Q Was Morgan ever in the firm?

"A I can't answer that. I don't know for sure.

"Q Was Shawn?

"A Shawn, yes. Shawn did.

"Q But you don't recall whether Morgan did or did not?

"A I am sure he did, too. I think. I am not

positive of that.

"Q Did your husband ever express the wish that he would like his sons to enter the family firm?

"A Yes.

"Q Did he urge them to do so?

"A No.

"Q Did Murray continue with the firm from the time that he first entered it in 1945 up until it was liquidated?

"A Yes.

"Q Charles did not though; did he?

"A No.

"Q When did he withdraw?

"A I don't know. I can't tell you.

"Q Would it have been shortly after he entered or did he stay with the firm for quite a while?

"A He stayed for a long time."

Skip on the next page down to line 17:

"Q When did your husband die, Mrs. McDojnell?

"A 1958, July.

"Q At the time of his death, was he active in the business of the firm?

"A No. He remained a partner but not active.

"Q When did he cease to become active?

"A I don't know.

"Q Was it for a considerable time before he passed away or a short time?

"A I can't tell you. I don't recall.

"Q Now, during the courseof your family life from 1917 through his death in 1958, were there discussions at home, at the dinner table or in the course of your family life, about the firm and its business and its problems or virtues?

"A I can't tell you that. There was always conversation but nothing that would recall any problems.

"Q Were there any discussions about the need for capital to run the business?

"A No, never."

Now, I go over to page 15.

"Q What did you inherit from your father?

"A Securities. That's it.

"Q Were they registered in your name, Anna McDonnell?

"A When I received them, yes.

"Q Where were they kept?

"A In my safe deposit box.

"Q Did you make any investment decisions with respect to those securities?

"A No.

"Q Did you retain what you inherited without any purchase or sale?

"Mr. Dubin: Do you understand the question?

"The Witness: No, I don't.

"Mr. Dubin: Will you please rephrase your question and maybe we can do better.

"Q Did nayone watch over the securities which were in your name and determine whether they shoudl be sold or converted into other types of assets?

"Mr. Dubin: What time period?

"Mr. Brooks: Any time period from the time she inherited them up until the death of Mr. McDonnell.

"Mr. Dubin: That would be over approximately a 40-year period.

"A My father died in 1929.

"Mr. Dubin: And Mr. McDonnell died in 1958, so you are talking about a period of 29 years.

"Mr. Brooks: Yes.

"Q Can you answer that question, Mrs. McDonnell?

"A My husband handled my affairs.

"Q Did he offer advice to you about transactions with your securities or was he empowered by you to make those as he judged correct?

"A He usually spoke with me.

"Q Was a common decision reached?

"A I would never question what he had to say.

"Q So you relied on his advice?

"A Yes."

Skipping over to the top of page 17:

"Q Now, subsequent to the death of your husband, did anyone supplement his role in respect to giving you investment advice as to your securities?

"A No.

"Q Did you then, thereafter, make your own decisions as to your portfolio of securities?

"Mr. Dubin: What period of time are we speaking about?

"Mr. Brooks: Subsequent to Mr. McDonnell, Sr.'s death.

"Mr. Dubin: From 1956 until the present?

"Mr. Brooks: Yes.

"A I had advice, I am sure. I don't recall who gave it to me or what.

"Q Did you consult with any of your sons on investment advice?

"Mr. Dubin: Well, would you define for her what you mean by 'investment advice'? I am quite

troubled myself.

"Mr. Brooks: Well, the tending of the securities which we have mentioned being in Mrs. McDonnell's name as to which her husband previously advised her. What I want to know now is did she seek the same kind of advice from any one of her sons.

"The Witness: Advice? My recollection is that I -- I probably discussed it. I don't recall any of that.

"Q Do you recall discussing it with any of your sons in particular, James, for instance?

"A No.

"Mr. Dubin: We are talking from the period, 1958 to the present, whether you sought advice from any of your sons as to your personnal investments.

"The Witness: I think mypersonal investments were never touched.

"Q They remained in the same securities?

"A Same securities.

"Q Were they still in the safe deposit box?

"A Yes.

"Q Did you have an accountant for your business affairs? For instance, the dividends on securities or the gains or losses from a purchase or sale of those

securities.

"A Yes.

"Q Do you recall who the first accountant was, if there were more than one?

"A It was one, Robert Aaronson.

"Q Was he with the firm or did he practice on his own?

"A He was with the -- he had his own firm.

"Q During what period of time was he your accountatnt?

"A Until maybe the last four years.

"Q When did he commence to be your accountant?

"A He was my husband's.

"Q How did his services to you come to be terminated?

"A He left his firm, he retired.

"Q Did you continue to do business with his successor?

"A I did.

"Q Is he your accountant today?

"A Yes.

"Q Did either Mr. Aaronson or his successor ever give you advice on investments?

"A No.

"Q Did you ever have an account executive at the firm of McDonnell & Company in charge of any of your investments?

"A What do you mean by that?

"Q Otherthan a son or your husband, was any employee of McDonnell & Company ever assigned to any account you would have had there or assigned to give you investment advice?

"A No.

"Q Did you ever receive, other than from your husband or your sons, any investment advice from anyone else?

"A No.

"Q You never have had an investment advisor or a bank give you investment advice?

"A No."

Turning to 21, towards the bottom:

"Q Did you ever study the stock market?

"A No.

"Q Mrs. McDonnell, prior to 1962, did you ever maintain a brokerage account with any brokerage house in your name?

"A You mean any other brokerage house?

"Q No. Any brokerage house.

"A McDonnell & Company I had an account.

"Q When did that start?

"A I haven't a clue.

"Q Wuite a while back. Was that in your name?

"A Yes.

"Q Have you ever subscribed to any business advisory service or letter?

"A No.

"Q Do you ever read the financial sections of the newspapers?

"A No.

"Q Have you ever read newspapers to detect any articles about McDonnell & Company?

"A What do you mean this?

"Q At any time.

"A I never saw anything about McDonnell & Company until they were in trouble.

"Q When did that first come to your attention, that they were in trouble?

"A The newspapers. When there was trouble with McDonnell & Company then I read -- when McDonnell & Company were in real trouble, I read very little of the newspapers."

Then we skip to 24, line 6:

"Q Can you recall when you first put securities or monies of your own into the McDonnell businesses either subordinated loan or as a partner or in any form?

"A I could recall when I did it, the year I don't know.

"Q Do you recall the type of transaction by which you put your securities into McDonnell & Company's businesses?

"A I just took it out of my box, brought it downtown.

"Q Why did you do that?

"A Well, because it was requested.

"Q By whom?

"A By Murray.

"Q Can you tell me what Murray said toyou at this time?

"A I believe -- no, I can't tell you.

"Q Do you recall the substance of what he might have said? If you can't recall the particular words --

"A I presume it was expansion, for expansion.

"Q Did he mention the New York Stock Exchange's capital rule?

"A No.

"Q Did he tell you anything about the condition

of the firm at the time you first put your securities into the firm?

"A No.

"Q At the time you did that, did you realize that your securities would be at the risk of the business; should the business fail that your securities would be available to creditors of the firm?

"Mr. Dubin: Mr. Brooks, I don't think we have established that when Mrs. McDonnell placed her securities into McDonnell & Company, it was as a subordinated account.

"Mr. Brooks: I just want to know whether she understood they would be at the risk of the business.

"Mr. Dubin: I don't understand what you are saying so I will hope that you would rephrase the question and maybe we will get Mrs. McDonnell to answer it.

"Mr. Brooks: Let us see if she can answer that.

"Mr. Dubin: Do you understand the question?

"The Witness: No, I don't understand what he means by -- I wouldn't consider it a risk.

"Q And you did not?

"A No.

"Q Did you have any understanding at the time you first put your securities into the firm of McDonnell that should that firm, or for any reason, fail that your securities would be lost?

"Mr. Dubin: Do you recall that?

"A I recall giving itand I recall I did it, so what.

"Q Did you have that understanding though?

"A I had that understanding that I would subordinate a certain amount.

"Mr. Brooks: All I want to know is when Mrs. McDonnell placed or delivered these securities that we have talked about at the request of Murray to thefirm, did you understand that were the firm to fail, however unexpected, that it might be that your securities could be lost and that they were at the risk of the business?

"The Wintess; Yes.

"Q Did Murray explain that to you?

"A I can't recall that.

"Q Would you have known that on your own?

"A On my own, I would have known that.

"Q Did you understand that when the bueiness

was a partnership and your husband was a partner in it that his assets were at the risk of the business and if the business failed they would be locked too and could be lost?

"A Do you mean always?

"Q While he was a partner in the firm.

"A While Mr. McDonnell was a partner?

"Q Yes, your husband.

"A It was always a risk of anybody losing."

Now, I turn to page 31:

"Q Mrs. McDonnell, Exhibit 1 is dated June 25th, 1962. Now, that would have been approximately four years after the death of your husband.

"Would this fact refresh your recollection that the subordinated loan referred to in Exhibit 1 would have been the first time that you put any money or securities into the firm of McDonnell & Company?

"A The first time."

Now we go to page 39, line 9:

"Q At the time that Murray McDonnell first asked you to contribute, invest your securities in McDonnell, had you ever been asked to put any of your securities or money in to the business by either your husband or anyone?

"Prior to that time had a request ever been made by anyone else?

"A Prior?

"Q Prior to Murray first asking you to put securities in --

"A No.

"Q -- or your husband or any other relative or son?

"A No.

"Q Did you ask any question about why your money was needed now for the firm?

"A Actually, no.

"Q Do you recall any explanation being given by Murray or anyone else as to why your money was being requested?

"A I think I mentioned earlier, expansion.

"Q Anything else?

"A No."

Page 42, please.

"Q Did you, in your own individual capacity, have any other financial interest in the firm at this time?

"A No.

"Q You were not a shareholder or debenture

holder or anything else in your own name?

"A No.

"Q Had you ever had any financial interest in the firm previously to this request?

"A No."

THE COURT: Why don't we take our break at this time since you are going on to another point.

We will stand in recess until 12:30.

(Recess)

(In open court; jury present)

"Q Mrs. McDonnell, one ofmy co-counsel chided me for only asking you whether any of your sons had given you investment advice and leaving out the question whether you received any from your daughters after the death of your husband?

"A No.

"Q Would you have received any from any of your daughters?

"A No.

"Q What about any other relatives or inlaws?

"A No.

"Q From the time of the death of your husband on, you received no investment advice similar to that which hegave you before his death; is that correct?

"A Yes."

Going down to page 82, line 8:

"Q Mrs. McDonnell, referring to Paragraph 18 of the complaint in this acdtion which Mr. Dubin has told us was prepared by your attorneys, in that paragraph it stated that in January 1969 you agreed to lend McDonnell securities having a market value in excess of $800,000 and that such securities were deposited in your subordinated account.

"Is that statement correct?

"A The maount I am not positive. I did subordinate my securities.

"Q At that time?

"A At that time.

"Q January 1969.

"Can you tell me how that came about?

"A It was requested.

"Q By whom?

"A By Murray.

"Q What did he say when he requested the securities?

"A I couldn't tell you that because I don't recall. I just know he asked for it and he got it.

"Q Do you recall whether he requested it in

person or in writing?

"A In person, I believe.

"Q Was it a meeting between the two of you?

"A No. A telephone conversation.

"Q Do you recall whether he told you that McDonnell had any problems at that time?

"A I don't really recall.

"Q Do you recall whether he told you that McDonnell was in violation of the New York Stock Exchange capital rule at that time?

"A No.

"Q He did not tellyou that?

"A (Shaking her head no.)

"Q Did he tell you that the firm had record keeping problems,--

"A No.

"-- at thattime?

"Q Did he tell you anything about the condition of McDonnell?

"A Not that I recall.

"Q Did he tell you why he needed additional securities to be deposited to your subordinated account on January 1969?

"A No. Unless just for the business.

"Q Did you only have the one telephone discussion with him?

"A I couldn't recall that.

"Q Can you tell me what you did physically after agreeing to his request? Did you go back to the bank and withdraw more securities from the box?

"A That is right."

Going to page 87, the very bottom:

"Q Do you know whether Margaret Murphy made a similar subordinated loan at aboutthis time?

"A No.

"Q Did you discuss it with anybody other than Murray at this time?

"A No.

"Q I didn't mean whether you discussed Mrs. Murphy's transaction with Murray. I meant to ask whether you discussed your transaction with anyone other than Murray at this time?

"A No.

"Q Did you ask Murray why the firm needed the additional securities?

"A No."

Page 91:

"Q Mrs. McDonnell, when Murray requested the

additional deposit of $800,000 -- or whatever the amount was -- did you hesitate, at all, in complying?

"A No.

"Q Would that have been your usual practice had it not been Murray calling?

"A Any child had what they wanted if I could give it to them, help them out.

"Q This letter of January 30th, 1969 refers to a 'conversation had yesterday' in which the writer reviewed his files and refreshed his memory to the subordination in your account which took place in June 1962.

"Do you have any recollection of such a conversation with any of your children?

"A No.

"Q The letter goes on to say that the writer was not happy about the subordination procedure as a long range solution to McDonnell's problems.

"Does that sentiment on behalf of the writer refresh your recollection as to what child it would have been?

"A No. It could have been Murray. It could have been Jim. It could have been shawn. It couldn't be Morgan, I don't think.

"Q Well, at this time, Shawn was not living, was he?

"A 1961 -- 1969, five years ago. 1968. Then it could be Murray. I don't know who it was. I don't recollect it anyway.

"Q The letter, in the second paragraph, says in part, 'Quoting from Murray's letter to you of August 2nd, 1965.'

"Now, that would seem to suggest that the writer of this letter must be someone other than Murray.

"A Somebody had a copy of the letter that Murray wrote to me.

"Q Would that reduce the possibility of the author of that letter to James?

"A Could be. I don't know. He can answer that better than I can.

"Q Do you recall James, at about this time, taking a position in opposition to your making a further subordination of McDonnell & Company?

"A No, I don't recollect that.

"Q Do you recollect James ever advising you not to put any more money into the firm?

"A No.

"Q The third paragraph of the letter says, in part, 'If subordinating your account subjects you to unnecessary risks.'

"Were you aware of any unnecessary risks in subordinating your account at this time?

"A I wouldn't use the word 'unnecessary.' There were risks.

"Q Will you tell me what they were?

"A The risk that I might lose all of my money.

"Q Were they explained to you by anyone?

"A I knew enough.

"Q Were there any more risks in 1969 than there were in 1962 or 1965?

"A Wouldn't you know that for yourself?

"Q The answre is yes.

"A Sure, there were more risks.

"Q Can you tell me why the risk was greater at this time?

"A No. The risk was greater becasue I was giving everything I had.

"Q Did the additional amount that you put in in January 1969 constitute all that you had?

"A Practically."

On the bottom of page 95:

"Q Were you aware of whether an investment in McDonnell in January of 1969 was any riskier than it was in 1962 or 1965?

"A Yes.

"Q Was it more risky in 1969?

"A Yes.

"Q Do you know why that was so?

"A Because it took everythingI had.

"The risk?

"Q To any investor.

"A I can't answer that because I don't know anything about that.

"Q So then you didn't have any knowledge about the risk for an investor, generally, in the firm of McDonnell & Co., Incorproated in 1969 as compared with 1962 or 1965?

"A I wouldn't have known anything about the investors in the company."

Turning to 99:

"Q At this time, January 1969, did you know whether McDonnell had been operating profitably or not?

"A No.

"Q Did you know what its capital position was --

"A No.

"Q -- under the New York Stock Exchange's capital rule?

"A No."

Page 102:

"Q Now, in the late '60s were Murray and Morgan the only members of your family who were active in the affairs of the firm after Shawn's death?

"A I believe so."

Page 106:

"Q In paragraph 2 of the complaint it says, that in the summer of 1969 the plaintiff, meaning you, was advised that McDonnell was experiencing serious financial difficulties.

"Do you recall receiving such advice in the summer of 1969?

"A Yes.

"Q Do you recall seeing --

"A That's the year they went to the moon. I just knew what happened.

"Q What did you know?

"A I just knew that we were in trouble.

"Q Financial trouble?

"A Yes. What else could you be in?

"Q Mrs. McDonnell, were you aware by this time

-- let us say the summer of 1969 -- that the stock exchange had, at some previous time, placed restrictions on the firm of McDonnell & Company?

"A I don't recollect that.

"Q Were you aware by this same time, the summer of 1969, that McDonnell had imposed restrictions upon itself?

"A No. I don't recollect.

"Q Can you say that you were never advised of that fact, up to this point, by anyone on behalf of McDonnell & Company?

"A I was advised of what?

"Q Of the fact that McDonnell had either been restricted by the exchange or imposed restrictions --

"A I don't recollect that at all.

"Q Could be one way or the other?

"A I wouldn't say that even."

Page 124:

"Q Did you receive any advice from anyone that conditions had worsened at McDonnell at the time you authorized Murray to sign your name to the letter of Septemb er 30, 1969?

"A No."

Page 130, bottom of the page:

"Q Mrs. McDonnell, the letter of September 30, 1969 which is Exhibit 20 was followed by a more formal agreement which has an effective date as of October 15th, 1969 and bears, what appears to be, your signature following the date of October 12, 1969.

"Will you look at it and tell me if you recall that agreement and whether that is your signature?

"A That is my signature.

"Q Applied by yourself?

"A Yes.

"Q Do you recall the agreement?

"A No.

"Q Do you recall your signing it, the event itself?

"A No. I signed it though.

"Q Do you recall where you signed it?

"Mr. Dubin: She said she didn't recall the event of signing it.

"A I don't recall when I signed it. I don't know where.

"Q Do you recall who presented it to you for signature?

"A I do not.

"Q Do you recall whether youhad any discussions

with anybody about this agreement?

"A No."

Page 137.

"Q The agreement which is Exhibit 21 also spoke about the signatories receiving second preferred common stock. I believe it's just preferred common stock.

"Did you ever receive such stock?

"A Yes."

139.

"Q Mrs. McDonnell, at the time you signed Exhibit 21, the agreement effective October 15th, did anyone on behalf of McDonnell & Company explain to you your rights under the arrangement whereby you had loaned your securities to McDonnell and your rights to terminate in that loan?

"A I don't recollect."

THE COURT: Mr. Beebe, is Exhibit 21 now another exhibit in evidence in this case?

MR. BEEBE: I believe it is, your Honor.

THE COURT: Let's have the record reflect what exhibit that is.

MR. BEEBE: I believe that is Plaintiff's Exhibit 5.

THE COURT: Ladies and gentlemen, Exhibit 21

in the deposition is Exhibit 5 in evidence before us in this case.

"Q Can you say that no one did explain such to you?

"A I said I don't recollect. Don't remember.

"Q At that time, i.e., the time you signed the agreement, did anyone explain to you what the financial condition of McDonnell was?

"A I don't recollect that.

"Q Would the answre be the same to the next question -- you wouldn't say positively whether no one did?

"A I can't say anything.

"Q Did anyone, at the time you signed the agreement effective October 15, 1969, tell you that there was no reasonable possibility that McDonnell would, in the foreseeable future, operate profitably?

"A No.

"Q Can you say that no one definitely did tell you that or are you just uncertain whether that was told to you or not told?

"A I don't recollect.

"Q Did anyone, at that time, tell you that there was a substantial possibility, if not the

probability, that McDonnell would not be able to operate its business to comply with the net capital requirements of theNew York Stock Exchange and the American Stock Exchange?

"A I can't answer that. I don't know.

"Q And you, likewise, could not say thatit was not said?

"A No.

"Q Mrs. McDonnell, other than the letter of September 30th, 1969, marked as Exhibit 20," which is now Plaintiffs' Exhibit 4 in this trial, "which is addressed to Mr. Robert Bishop the vice-president of the stock exchange, assuming that that is a communication by you to the stock exchange, were there any other communications between you and the New York Stock Exchange involving McDonnell & Company or your investment in it?

"A No communications to me from the New York Stock Exchange.

"Q Or to you from the Stock Exchange?

"A Not that I recollect.

"Q Other than that document, Mrs. McDonnell, which may be subject to argument, you are not aware of any communication between you and the New York Stock Exchange?

"A No.

"Q No telephone calls?

"A No.

"Q No letters?

"A Never.

"Q No personal meetings?

"A Never.

"Q Mrs. McDonnell, when the McDonnell & Company went into liquidation, were there any securities or cash funds of yours at the firm which you were entitled to get back other than those which the claim is now being made for?

"A I don't know at the moment. I can't recollect. I don't know that.

"Q Have you ever heard of the New York Stock Exchange Special Trust Fund?

"A Vaguely.

"Q Do you know --

"A Only lately I have heard that word.

"Q Do you know whether you were, at the time or subsequent to it, a beneficiary of assistance from that fund?

"A Never. Nobody ever gave me a dollar."

146.

"Q After you learned that McDonnell had been or

was going to be liquidated, did you ever discuss with Murray McDonnell the information that had been provided to you by McDonnell & Company at the time you had made your subordinated loans?

"A What information would I have that was given to me at the time of subordination? I had no information.

"Q You had no information at the time you made your subordinations?

"A No."

150.

"Q Mrs. McDonnell, I show you a document entitled 'Claim of Anna M. McDonnell' -- there is matter that follows but I will stop reading there --"

This is Exhibit 12 for identification and I would like to offer that in evidence.

THE COURT: Any objection?

MR. BROOKS: 12 for identification?

MR. BEEBE: Yes. We numbered them for identification and they may not be coming out of the numbering system.

MR. BROOKS: So we are skipping then.

MR. BEEBE: I'm offering it in evidence.

MR. BROOKS: Can you tell me the pages

from which you read?

MR. BEEBE: Just now?

MR. BROOKS: I believe you referred to 12 from some passage in the transcript.

MR. BEEBE: I'm just starting on that, the exhibit.

THE COURT: This started in the middle of 150. He read two lines, lines 12 and 13. That's all that we have read.

MR. BROOKS: Fine. I have no objection.

THE COURT: Very good. It may be received.

(Plaintiffs' Exhibit 12 was received in evidence)

MR. BEEBE: I'll start that question again.

"Q Mrs. McDonnell, I show you a document entitled 'Claim of Anna M. McDonnell' -- there is matter that follows but I will stop reading there -- which is signed by James F. McDonnell, Jr. as attorney, in fact, for Anna M. McDonnell.

"I would like you to look at that and any portions of it that you need to and the signature. I think I have a copy that's not bound. It may be simpler for you to review it.

"Did you authorize your son James to act as

attorney, in fact?

"A Yes.

"Q Mrs. McDonnell, there is also asserted in the action a claim on behalf of yourself and James McDonnell, Jr. as trustee under a trust created by your husband's will in which claim is made for $318,622.97 in respect to a subordinated Series B debenture of McDonnell & Company which was in your husband's estate and subsequently in the trust --

"I will ask the witness whether he signature appears on page 6 of the document dated April 27, 1970 which is entitled 'Claim of Anna M. McDonnell and James F. McDonnell, Jr. as trustees under the Will of James F. McDonnell against McDonnell & Co., Incorporated' for $318,622.97 plus interest and papers attached to the exhibits numbered through Exhibit 14.

"The question is: Can you tell me if it's your signature on page 6?

"A Yes. That's my signature.

"Q If you signed that document, would you have satisfied yourself that the statements made therein were true and correct when you did sign?

"A Jim did it. If it bears his signature and mine.

"Q Is that his signature under yours?

"A Yes.

"Q And if it does bear his signature and yours, would you conclude that the statements made arecorrect?

"A Absolutely."

MR. BEEBE: I offer that document.

(Pause)

MR. BEEBE: I'm offering Plaintiffs' Exhibit 11 for identification into evidence.

MR. BROOKS: May we have a moment to look at it? It's rather bulky.

THE COURT: While you are looking, Mr. Beebe, Exhibit 12 that is now in evidence is the exhibit which Mrs. McDonnell, Sr. here identified as the one signed by James F. McDonnell, Jr. as attorney in fact, right?

MR. BEEBE: That is correct, sir.

THE COURT: All right.

(Pause)

MR. BROOKS: Your Honor, I am puzzled. Perhaps Mr. Beebe can assist me. We have what appears to me to be two different claims here. One is a claim of the trustees in the Delaware receivership proceeding, and that claim is dated August 10, 1971.

The other document is a claim that is presented

to the liquidator of McDonnell & Company dated April 27, 1970.

It is my understanding that these are two separate claims which do not go together. Perhaps Mr. Beebe can educate me.

THE COURT: I think you can only go as far as the testimony in the transcript permits. One of these, I gather, was marked Exhibit 27 on the deposition and it's now Exhibit 12.

We have now come to another one which is marked Exhibit 14 on the deposition and is now marked Exhibit 11 on this trial.

Am I right about that, Mr. Beebe?

MR. BEEBE: I believe it was marked -- I'll read it to you. It says "With papers attached, with papers numbered through Exhibit 14 marked as New York Stock Exchange's Exhibit 25 for identification at the deposition."

THE COURT: 14 through 28? Or 28 for identification; is that right?

MR. BEEBE: That's right. Maybe what Mr. Brooks is saying these were two separate depositions at the deposition, which is so, and threr are two separate claims, which is also so. Since he offered them

at the deposition I don't see what further confusion there could be.

MR. BROOKS: I have no objection to them coming in, your Honor, but I think they should come in as two separate exhibits.

MR. BEEBE: That's the way they are being offered.

THE COURT: They are being offered as exhibits period.

MR. BROOKS: I didn't understand he was separating them. I apologize.

THE COURT: Any objection to 11?

MR. LOFLIN: If I understand Mr. Brooks correctly it was his suggestion that they be nominated either 11 and 12 or 11 and 11A. Is that what you were suggesting, Mr. Brooks?

MR. BROOKS: I think so. As I understand it, there is a claim from the recriver and the trustees in the amount of roughly $318,000, which is being offered here as Exhibit 11.

There is also a claim of the trustees to the liquidator, this bulky document; is that being offered as another numbered exhibit here?

MR. BEEBE: Let me just try and run it

through --

THE COURT: We are getting all confused because you want explanations of things. We are just marking an exhibit. It's either authentic and stipulated to or it isn't. We have 12 in evidence. There is an offer of 11. Is there any objection to 11?

MR. BROOKS: I would like to know what it is, your Honor.

THE COURT: Look at it and satisfy yourself as to what it is and whether you have any objection to its authenticity, relevance or otherwise. If you don't we will let it go in and we can grapple with it later.

MR. BROOKS: I have no objection to the documentthat has been presented to me. And 11 is the claim to the receiver. If that also contains the legal size document, which is the claim to the liquidator and is described in the deposition as Exhibit 14 in the deposition, I object to that being offered and admitted in this trial as one exhibit combined with the claim of the receiver, which is Exhibit 11 at this trial.

THE COURT: Are they being offered as one exhibit?

MR. BROOKS: I have no objection to them

coming in separately.

MR. BEEBE: Is this simply for clarity?

MR. BROOKS: Yes. I think the passage in the deposition transcript is only referring to the claim to the liquidator when it refers to Exhibit 14.

THE COURT: Which exhibits do you contend should be marked a separate number?

MR. BROOKS: The legal sized document headed "The claim of Anna M. McDonnell," that should be marked as a separate exhibit.

MR. BEEBE: Offer that as Exhibit 11 A.

(Plaintiffs' Exhibits 11 and 11A were received in evidence)

MR. BEEBE: I don't want to read anything twice to the jury out of this deposition. May I have permission to start at the bottom of 151?

THE COURT: Go ahead.

"Q I will ask the witness whether her signature appears on page 6 of the document dated April 27, 1970 which is entitled 'Claim of Anna M. McDonnell and James F. McDonnell, Jr. as Trustees under the Will of James F. McDonnell against McDonnell & Co., Incorporated" for $318,622.97 plus interest and papers attached to the exhibits numbered thrugh Exhibit 14.

"The question is: Can you tell me if it's your signature on page 6?

"A Yes. That's my signature."

THE COURT: What exhibit is that?

MR. BEEBE: That is No. 11.

MR. BROOKS: 11A, your Honor.

MR. BEEBE: I'm sorry. Let me show it to you.

(Pause)

MR. BROOKS: Your Honor, I disagree with counsel's interpretation of the transcript. The transcript is talking about --

THE COURT: I know. Forget what the transcript is talking about. What is the document dated April 27, 1970?

MR. BROOKS: That is Exhibit 11A.

THE COURT: I want it to be clear. That is what everybody is talking about in this question and answer.

MR. BEEBE: That is fine with me, your Honor.

THE COURT: 11A. Go ahead.

MR. BEEBE: Starting at line 12:

"Q If you signed that document, would you have

satisfied yourself that the statements made there in were true and correct when you did sign?

"A Jim did it. If it bears his signature and mine.

"Q Is that his signature under yours?

"A Yes.

"Q And if it does bear his signature and yours, would you conclude that the statements made are correct?

"A Absolutely."

Page 155, the bottom.

"Q Mrs. McDonnell, were you aware of the purported substitution of the Series E debenture for the Series B debenture that those documents, 3 through 6, speak of at the time?

"A I don't recall.

"Q Did you authorize such an exchange?

"A I wouldn't authorize. It would be Jim to do the authorization.

"Mr. Dubin: Did you authorize the B to be exchanged to an E?

"The Witness: No."

Bottom of 157.

"Q What appears to be Exhibit 9 to Exhibit 28, which is not so labeled on this copy because I believe the designation of Exhibit 9 has been blocked out in the copy process, is a letter dated September 12th, 1969 appearing to be signed by yourself and your son James, addressed to McDonnell.

"I ask you if that is your signature and James' at the bottom?

"A Yes."

THE COURT: What exhibit is that now?

MR. BROOKS: Exhibit 9 to Exhibit 11-A.

THE COURT: The trial exhibit?

MR. BROOKS: Trial Exhibit 11-A.

THE COURT: Very good.

MR. BEEBE: Page 161:

"Q Mrs. McDonnell, here is a claim in the Delaware receivership proceedings entitled 'Claim of Anna McDonnell and James F. McDonnell, Jr. as trustees' and it continues." Which I believe is 11 in the trial here.

"I ask you to look at the signature page which I have open for you and tell me whether you authorized James F. McDonnell, Jr. to sign as your attorney, in fact --

"A I did.

"Q -- to prosecute that claim?

"A Yes."

MR. BEEBE: Turning to the last page, there is a question by Mrs. Steinberg representing the American Stock Exchange:

"Q Mrs. McDonnell, did you, during the course of the period which we have been discussing, which I would date from 1958 through 1970, have any communications, either written or oral, with any officer or employee of the American Stock Exchange?

"A No. Never."

THE COURT: Now, I would assume that those of you at the defense table who want to read certain portions of this, why don't you reserve your right to do that until you have had a chance to assess what has been marked and what you want to read as bearing upon it, and you can do that on the next day, gentlemen.

MR. BROOKS: I certainly appreciate that suggestion.

THE COURT: Very good.

MR. BEEBE: May we approach the bench?

THE COURT: Surely.

(At the side bar:)

MR. BEEBE: This catches me somewhat off guard because I had anticipated the reading of the cross at the same time as the direct, so the jury would have everything in one place.

THE COURT: What you were going to read from --

MR. BEEBE: He was supposed to read --

MR. BROOKS: It is overlapping in great part. It is a difficult thing for a defense counsel to do this in a logical way. If this trial were going to end this afternoon that is one things, but it isn't.

MR. BEEBE: My other problem, of course, is that I can put Mr. Jim McDonnell on the stand, but I don't have all the exhibits and everything together. I can ask him questions for half an hour.

THE COURT: Why don't you start then?

MR. BEEBE: Very well, your Honor.

(In open court. Jury present.)

MR. BEEBE: I call Jemes F. McDonnell, Jr., as the next witness for the plaintiffs.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MARGARET MARY McDONNELL MURPHY, Plaintiff-Appellant, -against- McDONNELL & CO., INCORPORATED and THE NEW YORK STOCK EXCHANGE by ROBERT W. HAACK, President, Defendants, JAMES F. McDONNELL, JR., individually, as Trustee under the Will of James F. McDonnell and as Executor of the Estate of Anna M. McDonnell, and CHARLES E. McDONNELL, as Executor of the Estate of Anna M. McDonnell, Plaintiff-Appellants, -against- THE NEW YORK STOCK EXCHANGE by ROBERT W. HAACK, THE NEW YORK STOCK EXCHANGE, INC., THE AMERICAN STOCK EXCHANGE by H. VERNON LEE, JR., Secretary, and McDONNELL & CO., INC., Defendants.	AFFIDAVIT OF PERSONAL SERVICE Docket No. 76-7278

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ANDRIJ PRIATKA, being duly sworn, deposes and says:

I am not a party to this action, I am over the age of eighteen years and reside at 236 East 5th Street, New York, New York 10003; on the 8th day of October, 1976, I personally served a true copy of each of the following documents:

1. Joint Appendix Volumes A-1 through A-8
2. Joint Appendix of Exhibits

in the within action by personally delivering the same to the attorneys for each defendant at the following addresses:

Milbank, Tweed, Hadley & McCloy
Attorneys for Defendant
New York Stock Exchange
One Chase Manhattan Plaza
New York, New York 10005

Lord Day & Lord
Attorneys for Defendant
American Stock Exchange
25 Broadway
New York, New York 10005

Proskauer, Rose, Goetz & Mendelsohn
Attorneys for McDonnell & Co., Inc.
300 Park Avenue
New York, New York 10022.

Sworn to before me this

8th day of October, 1976.

Notary Public

GRACE H. YOSHIZAKI
Notary Public, State of New York
No. 43-4365200
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1977

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

DAVIS & COX

Attorneys for

Office and Post Office Address

One State Street Plaza

New York, New York 10004

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

DAVIS & COX

Attorneys for

Office and Post Office Address

One State Street Plaza

New York, New York 10004

To

Attorney(s) for

Docket
No. 76-7278 Year 19

UNITED STATESCOURT OF APPEALS
FOR THE SECOND CIRCUIT

MARGARET MARY McDONNELL MURPHY,
Plaintiff-Appellant,
-against-
McDONNELL & CO., INCORPORATED
et ano.,
Defendants,
JAMES F. McDONNELL, JR., et ano.,
Plaintiff-Appellants,
-against-
THE NEW YORK STOCK EXCHANGE,
et al.,
Defendants.

AFFIDAVIT OF PERSONAL SERVICE

DAVIS & COX

Attorneys for Plaintiff-Appellants

Office and Post Office Address, Telephone

One State Street Plaza

New York, New York 10004

(212) 425-0500

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

1800-©1973. JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N.Y. 10004